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for review and comment on the request.

(c) Notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

### **§ 217.209 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 217.207 and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.208, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.202(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.207 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

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AUTHORITY: 16 U.S.C. 1361 *et seq.*

SOURCE: 74 FR 28343, June 15, 2009, unless otherwise noted.

### **Subpart A—Taking Marine Mammals Incidental to U.S. Navy Training in the Virginia Capes Range Complex (VACAPES Range Complex)**

#### **§ 218.1 Specified activity, specified geographical area and effective dates.**

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the VACAPES Range Complex Operation Area (OPAREA), which is located in the coastal and offshore waters of the western North Atlantic Ocean adjacent to Delaware, Maryland, Virginia, and North Carolina. The northernmost boundary of the VACAPES Range Complex OPAREA is located 37 nautical miles (nm) off the entrance to Delaware Bay at latitude 38°45' N, the farthest point of the eastern boundary is 184 nm east of Chesapeake Bay at longitude 72°41' W, and the southernmost point is 105 nm southeast of Cape Hatteras, North Carolina, at latitude of 34°19' N. The western boundary of the VACAPES Range Complex OPAREA lies 3 nm from the shoreline at the boundary separating state and Federal waters.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the explosive munitions, or similar explosive types, indicated in paragraph (c)(1)(i) of this section conducted as part of the Navy training events, or similar training events, indicated in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:

(A) AGM-114 (Hellfire missile)

(B) AGM-65 E/F (Maverick missile)

(C) MK-83/GBU-32 (1,000 lb High Explosive bomb)

(D) Airborne Mine Neutralization system (AMNS)

(E) 20 lb NEW charges

(F) AGM-88 (HARM)

(G) 5" Naval Gunfire

(ii) Training events (with approximated number of events)

(B) Mine Exercise (MINEX) (Mine Neutralization [20 lb NEW charges])—up to 120 exercises over the course of 5 years (an average of 24 per year);

(C) Bombing Exercise (BOMBEX) (Air-to-Surface)—up to 100 exercises over the course of 5 years (an average of 20 per year);

(D) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile)—up to 300 exercises over the course of 5 years (an average of 60 per year);

(E) Missile Exercise (MISSILEX) (Air-to-Surface; Maverick, HE)—up to 100 exercises over the course of 5 years (an average of 20 per year); and

(F) FIREX with IMPASS—up to 110 exercises over the course of 5 years (an average of 22 per year).

(2) [Reserved]

(d) Amended regulations are effective from February 1, 2012, through June 4, 2016.

(e) The taking of marine mammals may be authorized in an LOA for the explosive types and activities, or similar explosives or activities, listed in § 218.1(c) should the amounts (e.g., number of exercises) vary from those estimated in § 218.1(c), provided that the variation does not result in exceeding the amount of take indicated in § 218.2(c).

[74 FR 28343, June 15, 2009, as amended at 76 FR 30554, May 26, 2011; 77 FR 4922, Feb. 1, 2012]

#### **§ 218.2 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 218.7, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.1(b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.1(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.1(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—10 (an average of 2 annually); and

(B) Fin whale (*Balaenoptera physalus*)—10 (an average of 2 annually).

(ii) Odontocetes:

(A) Sperm whale (*Physeter macrocephalus*)—10 (an average of 2 annually);

(B) Pygmy or dwarf sperm whales (*Kogia* sp.)—15 (an average of 3 annually);

(C) Rough-toothed dolphin (*Steno bredanensis*)—5 (an average of 1 annually);

(D) Bottlenose dolphin (*Tursiops truncatus*)—145 (an average of 29 annually);

(E) Pantropical spotted dolphin (*Stenella attenuata*)—350 (an average of 70 annually);

(F) Striped dolphin (*S. coeruleoalba*)—340 (an average of 68 annually);

(G) Clymene dolphin (*S. clymene*)—165 (an average of 33 annually);

(H) Atlantic spotted dolphin (*S. frontalis*)—215 (an average of 43 annually);

(I) Common dolphin (*Delphinus delphis*)—10,965 (an average of 2,193 annually);

(J) Risso's dolphin (*Grampus griseus*)—80 (an average of 16 annually); and

(K) Pilot whales (*Globicephala* sp.)—50 (an average of 10 annually).

(2) Level A Harassment (injury):

(i) Atlantic spotted dolphin—5 (an average of 1 annually);

(ii) Common dolphin—100 (an average of 20 annually);

(iii) Pantropical spotted dolphin—5 (an average of 1 annually); and

(iv) Striped dolphin—15 (an average of 3 annually).

### § 218.3 Prohibitions.

Notwithstanding takings contemplated in § 218.2 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.7, no person in connection with the activities described in § 218.1 may:

(a) Take any marine mammal not specified in § 218.2(c);

(b) Take any marine mammal specified in § 218.2(c) other than by incidental take as specified in § 218.2(c)(1) and (2);

(c) Take a marine mammal specified in § 218.2(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.7.

### § 218.4 Mitigation.

(a) When conducting training activities identified in § 218.1(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.7 must be implemented. These mitigation measures include, but are not limited to:

(1) *General Maritime Measures*:

(i) Personnel Training—Lookouts

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick

and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures and Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for

safety of navigation and man-over-board precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a “safe speed” so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When whales have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or direction and would be dictated by environmental and other conditions (*e.g.*, safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel’s safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate

safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements. (i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable to Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration: The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and the VACAPES Range Complex.

(i) Mid-Atlantic, Offshore of the Eastern United States:

(A) All Navy vessels are required to use extreme caution and operate at a slow, safe speed consistent with mission and safety (at a speed that does not compromise safety of navigation) during the months indicated below and within a 37 km (20 nm) arc (except as noted) of the specified associated reference points:

(1) South and East of Block Island (37 km (20 NM) seaward of line between 41–4.49° N. lat. 071–51.15° W. long. and 41–18.58° N. lat. 070–50.23° W. long.): Sept-Oct and Mar-Apr

(2) New York/New Jersey (40–30.64° N. lat. 073–57.76° W. long.): Sep-Oct and Feb-Apr.

(3) Delaware Bay (Philadelphia) (38–52.13° N. lat. 075–1.93° W. long.): Oct-Dec and Feb-Mar.

(4) Chesapeake Bay (Hampton Roads and Baltimore) (37–1.11° N. lat. 075–57.56° W. long.): Nov-Dec and Feb-Apr.

(5) North Carolina (34–41.54° N. lat. 076–40.20° W. long.): Dec-Apr.

(6) South Carolina (33–11.84° N. lat. 079–8.99° W. long. and 32–43.39° N. lat. 079–48.72° W. long.): Oct-Apr.

(B) During the months indicated in paragraph (a)(3)(i)(A) of this section, Navy vessels shall practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified in paragraph (a)(3)(i)(A) of this section.

(C) All surface units transiting within 56 km (30 NM) of the coast in the mid-Atlantic shall ensure at least two watchstanders are posted, including at least one lookout who has completed required MSAT training.

(D) Navy vessels shall not knowingly approach any whale head on and shall maneuver to keep at least 457 m (1,500 ft) away from any observed whale, consistent with vessel safety.

(ii) Southeast Atlantic, Offshore of the Eastern United States—for the purposes of the measures below (paragraphs (a)(3)(ii)(A) & (B) of this section), the “southeast” encompasses sea space from Charleston, South Carolina, southward to Sebastian Inlet, Florida, and from the coast seaward to 148 km (80 NM) from shore. North Atlantic right whale critical habitat is the area from 31–15° N. lat. to 30–15° N. lat. extending from the coast out to 28 km (15 NM), and the area from 28–00° N. lat. to 30–15° N. lat. from the coast out to 9 km (5 NM). All mitigation measures described here that apply to the critical habitat apply from November 15-April 15 and also apply to an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries.

(A) Prior to transiting or training in the critical habitat or associated area of concern, ships shall contact Fleet Area Control and Surveillance Facility, Jacksonville, to obtain latest whale sighting and other information

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needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised) and path of intended movement. Subs shall contact Commander, Submarine Group Ten for similar information.

(B) The following specific mitigation measures apply to activities occurring within the North Atlantic right whale critical habitat and an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries:

(1) When transiting within the critical habitat or associated area of concern, vessels shall exercise extreme caution and proceed at a slow safe speed. The speed shall be the slowest safe speed that is consistent with mission, training and operations.

(2) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than 12 hours old. Circumstances could arise where, in order to avoid North Atlantic right whale(s), speed reductions could mean vessels must reduce speed to a minimum at which it can safely keep on course or vessels could come to an all stop.

(3) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when a change of course would create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(4) During the North Atlantic right whale calving season, north-south transits through the critical habitat are prohibited.

(5) Ships, surfaced subs, and aircraft shall report any whale sightings to Fleet Area Control and Surveillance Facility, Jacksonville, by the quickest and most practicable means. The sighting report shall include the time, latitude/longitude, direction of movement and number and description of whale (*i.e.*, adult/calf).

(iii) Northeast Atlantic, Offshore of the Eastern United States:

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(A) Prior to transiting the Great South Channel or Cape Cod Bay critical habitat areas, ships shall obtain the latest North Atlantic right whale sightings and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised). The Great South Channel critical habitat is defined by the following coordinates: 41–00° N. lat., 69–05° W. long.; 41–45° N. lat., 69–45° W. long.; 42–10° N. lat., 68–31° W. long.; 41–38° N. lat., 68–13° W. long. The Cape Cod Bay critical habitat is defined by the following coordinates: 42–04.8° N. lat., 70–10° W. long.; 42–12° N. lat., 70–15° W. long.; 42–12° N. lat., 70–30° W. long.; 41–46.8° N. lat., 70–30° W. long.

(B) Ships, surfaced subs, and aircraft shall report any North Atlantic right whale sightings (if the whale is identifiable as a right whale) off the northeastern U.S. to Patrol and Reconnaissance Wing (COMPATRECONWING). The report shall include the time of sighting, lat/long, direction of movement (if apparent) and number and description of the whale(s).

(C) Vessels or aircraft that observe whale carcasses shall record the location and time of the sighting and report this information as soon as possible to the cognizant regional environmental coordinator. All whale strikes must be reported. This report shall include the date, time, and location of the strike; vessel course and speed; operations being conducted by the vessel; weather conditions, visibility, and sea state; description of the whale; narrative of incident; and indication of whether photos/videos were taken. Navy personnel are encouraged to take photos whenever possible.

(D) Specific mitigation measures related to activities occurring within the critical habitat include the following:

(1) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when change of course would create an imminent and serious threat to person, vessel, or aircraft,

and to the extent vessels are restricted in the ability to maneuver.

(2) When transiting within the critical habitat or associated area of concern, vessels shall use extreme caution and operate at a safe speed (the minimum speed at which mission goals or safety will not be compromised) so as to be able to avoid collisions with North Atlantic right whales and other marine mammals, and stop within a distance appropriate to the circumstances and conditions.

(3) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than one week old.

(4) Ships transiting in the Cape Cod Bay and Great South Channel critical habitats shall obtain information on recent whale sightings in the vicinity of the critical habitat. Any vessel operating in the vicinity of a North Atlantic right whale shall consider additional speed reductions per Rule 6 of International Navigational Rules.

(4) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the death), the Navy shall suspend its activities immediately and report the incident to NMFS.

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5-in. Explosive Rounds):

(A) FIREX using IMPASS would only be conducted in the four designated areas specified in the Navy's LOA application in the VACAPES Range Complex.

(B) Pre-exercise monitoring of the target area shall be conducted with "Big Eyes" prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships shall be required to maintain a lookout dedicated to visually searching for marine mammals 180° along the ship track line and 360° at each buoy drop-off location.

(C) "Big Eyes" on the ship shall be used to monitor a 600 yd (548 m) buffer zone around the target area for marine mammals during naval-gunfire events.

(D) Ships shall not fire on the target if any marine mammals are detected within or approaching the 600 yd (548 m) buffer zone until the area is cleared. If marine mammals are present, operations shall be suspended. Visual observation shall occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

(E) Post-exercise monitoring of the entire target area shall take place with "Big Eyes" and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

(F) FIREX with IMPASS shall take place during daylight hours only.

(G) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(H) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

(I) No firing shall occur if marine mammals are detected within 70 yd (64 m) of the vessel.

(ii) Air-to-Surface At-Sea Bombing Exercises (250-lbs to 2,000-lbs explosive bombs):

(A) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at the slowest safe speed.

(B) A buffer zone of 5,100-yd (4,663 m) radius shall be established around the intended target zone. The exercises shall be conducted only when marine mammals are observed to be outside the buffer zone.

(C) At-sea BOMBEXs using live ordnance shall occur during daylight hours only.

(iii) Air-to-Surface Missile Exercises (Explosive):

(A) Aircraft shall initially survey the intended ordnance impact area for marine mammals.

(B) During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of marine mammal transiting the range.

(C) Visual inspection of the target area shall be made by flying at 1,500 ft



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(457 m) altitude or lower, if safe to do so, and at slowest safe speed.

(D) Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

(iv) Mine Neutralization Training Involving Underwater Detonations (up to 20-lb charges):

(A) This activity shall only occur in W-50 of the VACAPES Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 700 yd (640 m) radius from detonation location for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever assets are available.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear of marine mammals for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear of marine mammals for 30 minutes prior to detonation.

(F) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet (Chesapeake Bay Inlets).

(G) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(H) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

(b) [Reserved]

### §218.5 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §216.106 of this chapter and §218.7 for activities described in §218.1(c) is required to cooperate with the NMFS when moni-

toring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in §218.1(c) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in §218.2(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the VACAPES Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) *Vessel or aerial surveys.* (i) The Holder of this Authorization shall visually survey a minimum of 2 explosive events per year, one of which shall be a multiple detonation event. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs).

(ii) Where operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (*i.e.*, the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

- (A) Location of sighting;
- (B) Species (if not possible, indicate whale, dolphin or pinniped);
- (C) Number of individuals;
- (D) Whether calves were observed;
- (E) Initial detection sensor;
- (F) Length of time observers maintained visual contact with marine mammal;
- (G) Wave height;
- (H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);

(K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munition type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array shall have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms. (i) As required in §218.5(c)(1), MMOs selected for aerial or vessel survey shall be placed on a Navy platform during one of the explosive exercises being monitored per year, the other designated exercise shall be monitored by the Navy lookouts/watchstanders.

(ii) The MMO must possess expertise in species identification of regional

marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. Information collected by MMOs be the same as those collected by Navy lookout/watchstanders described in §218.5(c)(1)(iv).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan.

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(5) A method for standardizing data collection for VACAPES Range Complex and across range complexes.

(e) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual VACAPES Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the VACAPES Range Complex Monitoring Plan. Data collection methods shall be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the VACAPES Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the data required in §218.5(g). The VACAPES Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from VACAPES Range Complex and multiple range complexes.

(g) Annual VACAPES Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(1) Total annual number of each type of explosive exercise (of those identified as part of the “specified activity” in this final rule) conducted in the VACAPES Range Complex.

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(h) VACAPES Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the VACAPES Range Complex exercises for which annual reports are required (Annual VACAPES Range Complex Exercise Reports and VACAPES Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (May 2013), covering activities that have occurred through December 1, 2012.

(i) The Navy shall respond to NMFS' comments and requests for additional information or clarification on the VACAPES Range Complex Comprehensive Report, the Annual VACAPES Range Complex Exercise Report, or the Annual VACAPES Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports shall be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(j) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

### §218.6 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations in this subpart, the U.S. citizen (as defined by §216.103) conducting the activity identified in §218.1(c) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in

accordance with §218.7 or a renewal under §218.8.

**§218.7 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in §218.8 and the modification conditions in §218.9.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4922, Feb. 1, 2012]

**§218.8 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §216.106 of this chapter and §218.7 for the activity identified in §218.1(c) may be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under §218.6 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Timely receipt of the monitoring reports required under §218.5(c) through (i); and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §218.4 and the Letter of Authorization issued under §216.106 of this chapter and §218.7, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under

§216.106 of this chapter and §218.8 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from VACAPES Range Complex or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§218.5(j)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§218.5(d))).

(4) Results from specific stranding investigations (either from the VACAPE Range Complex Study Area or other locations, and involving coincident explosives training or not involving coincident use).

(5) Results from general marine mammal and sound research (funded by the Navy or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number

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not authorized by these regulations or subsequent Letters of Authorization.

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

### §218.9 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §216.106 of this chapter and §218.7 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.8, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.2(c), a Letter of Authorization issued pursuant to §216.106 of this chapter and §218.7 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### Subpart B—Taking Marine Mammals Incidental to U.S. Navy Training in the Jacksonville Range Complex (JAX Range Complex)

SOURCE: 74 FR 28365, June 15, 2009, unless otherwise noted.

### §218.10 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the JAX Range Complex

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Operation Areas (OPAREAs), which are located along the southern east coast of the U.S. The two principal OPAREAs within the JAX Study Area are the Jacksonville OPAREA and the Charleston OPAREA (sometimes referred to collectively as the JAX/CHASN OPAREA, or simply the OPAREA). The northernmost point of the JAX/CHASN OPAREA is located just north of Wilmington, North Carolina (34°37' N) in waters less than 20 m (65.6 ft) deep, while the easternmost boundary lies 281 nm (518.6 km) offshore of Jacksonville, Florida (77°00' W in waters with a bottom depth of nearly 2,000 m [1.243 mi]).

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the explosive munitions, or similar explosive types, indicated in paragraph (c)(1)(i) of this section conducted as part of the Navy training events, or similar training events, indicated in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:

(A) AGM-114 (Hellfire missile);

(B) AGM-65 E/F (Maverick missile);

(C) Mine Neutralization (20 lb NEW charges);

(D) 5" Naval Gunfire;

(E) MK3A2 anti-swimmer concussion grenades.

(ii) Training Events:

(A) Mine Neutralization (20 lb NEW charges)—up to 60 exercises over the course of 5 years (an average of 12 per year);

(B) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile)—up to 350 exercises over the course of 5 years (an average of 70 per year);

(C) Missile Exercise (MISSILEX) (Air-to-Surface; Maverick)—up to 15 exercises over the course of 5 years (an average of 3 per year);

(D) FIREX with IMPASS—up to 50 exercises over the course of 5 years (an average of 10 per year); and

(E) Small Arms Training with MK3A2 anti-swimmer concussion grenade (0.5 lbs NEW)—up to 400 grenades over the course of 5 years (an average of 80 HE grenades used per year).

(2) [Reserved]

(d) Amended regulations are effective February 1, 2012, through June 4, 2016.

(e) The taking of marine mammals may be authorized in an LOA for the explosive types and activities, or similar explosives and activities, listed in § 218.10(c) should the amounts (e.g., number of exercises) vary from those estimated in § 218.10(c), provided that the variation does not result in exceeding the amount of take indicated in § 218.11(c).

[74 FR 28365, June 15, 2009, as amended at 76 FR 30554, May 264, 2011; 77 FR 4923, Feb. 1, 2012]

#### § 218.11 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.16, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.10(b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.10(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.10(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);

(ii) Pantropical spotted dolphin (*Stenella attenuata*)—100 (an average of 20 annually);

(iii) Clymene dolphin (*S. clymene*)—100 (an average of 20 annually);

(iv) Atlantic spotted dolphin (*S. frontalis*)—310 (an average of 62 annually);

(v) Striped dolphin (*S. coeruleoalba*)—100 (an average of 20 annually);

(vi) Risso's dolphin (*Grampus griseus*)—150 (an average of 30 annually);

(vii) Common dolphin (*Delphinus delphis*)—150 (an average of 30 annually);

(viii) Pilot whales (*Globicephala* sp.)—100 (an average of 20 annually);

(ix) Dwarf or pygmy sperm whales (*Kogia* sp.)—15 (an average of 3 annually);

(x) Beaked whales—100 (an average of 20 annually);

(xi) Minke whales (*Balaenoptera acutorostrata*)—15 (an average of 3 annually).

(2) Level A Harassment (injury):

(i) Atlantic spotted dolphin—10 (an average of 2 annually).

(ii) [Reserved]

#### § 218.12 Prohibitions.

Notwithstanding takings contemplated in § 218.11 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.16, no person in connection with the activities described in § 218.10 may:

(a) Take any marine mammal not specified in § 218.11(c);

(b) Take any marine mammal specified in § 218.11(c) other than by incidental take as specified in § 218.11(c)(1) and (2);

(c) Take a marine mammal specified in § 218.11(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.16.

#### § 218.13 Mitigation.

(a) When conducting training activities identified in § 218.10(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.16 must be implemented. These mitigation measures include, but are not limited to:

(1) General Maritime Measures:

(i) Personnel Training—Lookouts:

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the

Lookout Training Handbook  
(NAVEDTRA 12968–D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures & Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to

the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a “safe speed” (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (*e.g.*, safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel’s

safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200 yds (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements:

(i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable to Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration: The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and the JAX Range Complex OPAREA.

(i) Mid-Atlantic, Offshore of the Eastern United States:

(A) All Navy vessels are required to use extreme caution and operate at a slow, safe speed consistent with mission and safety during the months indicated below and within a 37 km (20 nm) arc (except as noted) of the specified associated reference points:

(1) South and East of Block Island (37 km (20 NM) seaward of line between 41–4.49° N. lat. 071–51.15° W. long. and 41–18.58° N. lat. 070–50.23° W. long.): Sept-Oct and Mar-Apr

(2) New York/New Jersey (40–30.64° N. lat. 073–57.76° W. long.): Sep-Oct and Feb-Apr.

(3) Delaware Bay (Philadelphia) (38–52.13° N. lat. 075–1.93° W. long.): Oct-Dec and Feb-Mar.

(4) Chesapeake Bay (Hampton Roads and Baltimore) (37–1.11° N. lat. 075–57.56° W. long.): Nov-Dec and Feb-Apr.

(5) North Carolina (34–41.54° N. lat. 076–40.20° W. long.): Dec-Apr

(6) South Carolina (33–11.84° N. lat. 079–8.99° W. long. and 32–43.39° N. lat. 079–48.72° W. long.): Oct-Apr

(B) During the months indicated in paragraph (a)(3)(i)(A) of this section, Navy vessels shall practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified in paragraph (a)(3)(i)(A) of this section.

(C) All surface units transiting within 56 km (30 NM) of the coast in the mid-Atlantic shall ensure at least two watchstanders are posted, including at least one lookout who has completed required MSAT training.

(D) Navy vessels shall not knowingly approach any whale head on and shall maneuver to keep at least 457 m (1,500 ft) away from any observed whale, consistent with vessel safety.

(ii) Southeast Atlantic, Offshore of the Eastern United States—for the purposes of the measures below (paragraphs (a)(3)(ii)(A) & (B) of this section), the “southeast” encompasses sea space from Charleston, South Carolina, southward to Sebastian Inlet, Florida, and from the coast seaward to 148 km (80 NM) from shore. North Atlantic right whale critical habitat is the area



from 31–15° N. lat. to 30–15° N. lat. extending from the coast out to 28 km (15 NM), and the area from 28–00° N. lat. to 30–15° N. lat. from the coast out to 9 km (5 NM). All mitigation measures described here that apply to the critical habitat apply from November 15–April 15 and also apply to an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries.

(A) Prior to transiting or training in the critical habitat or associated area of concern, ships shall contact Fleet Area Control and Surveillance Facility, Jacksonville, to obtain latest whale sighting and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised) and path of intended movement. Subs shall contact Commander, Submarine Group Ten for similar information.

(B) The following specific mitigation measures apply to activities occurring within the North Atlantic right whale critical habitat and an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries:

(1) When transiting within the critical habitat or associated area of concern, vessels shall exercise extreme caution and proceed at a slow safe speed. The speed shall be the slowest safe speed that is consistent with mission, training and operations.

(2) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than 12 hours old. Circumstances could arise where, in order to avoid North Atlantic right whale(s), speed reductions could mean vessels must reduce speed to a minimum at which it can safely keep on course or vessels could come to an all stop.

(3) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when a change of course would create an imminent and serious threat to a person, vessel, or aircraft,

and to the extent vessels are restricted in the ability to maneuver.

(4) During the North Atlantic right whale calving season, north-south transits through the critical habitat are prohibited, except for Precision Anchoring drills and the Shipboard Electronic System Evaluation Facility range that necessarily operate at slow, safe speed.

(5) Ships, surfaced subs, and aircraft shall report any whale sightings to Fleet Area Control and Surveillance Facility, Jacksonville, by the quickest and most practicable means. The sighting report shall include the time, latitude/longitude, direction of movement and number and description of whale (*i.e.*, adult/calf).

(6) Naval vessel operations in the North Atlantic right whale critical habitat and AAOC during the calving season shall be undertaken during daylight and periods of good visibility, to the extent practicable and consistent with mission, training, and operation. When operating in the critical habitat and AAOC at night or during periods of poor visibility, vessels shall operate as if in the vicinity of a recently reported NARW sighting.

(iii) Northeast Atlantic, Offshore of the Eastern United States:

(A) Prior to transiting the Great South Channel or Cape Cod Bay critical habitat areas, ships shall obtain the latest North Atlantic right whale sightings and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised). The Great South Channel critical habitat is defined by the following coordinates: 41–00° N. lat., 69–05° W. long.; 41–45° N. lat., 69–45° W. long.; 42–10° N. lat., 68–31° W. long.; 41–38° N. lat., 68–13° W. long. The Cape Cod Bay critical habitat is defined by the following coordinates: 42–04.8° N. lat., 70–10° W. long.; 42–12° N. lat., 70–15° W. long.; 42–12° N. lat., 70–30° W. long.; 41–46.8° N. lat., 70–30° W. long.

(B) Ships, surfaced subs, and aircraft shall report any North Atlantic right whale sightings (if the whale is identifiable as a right whale) off the northeastern U.S. to Patrol and Reconnaissance Wing (COMPATRECONWING). The report shall include the time of

sighting, lat/long, direction of movement (if apparent) and number and description of the whale(s).

(C) Vessels or aircraft that observe whale carcasses shall record the location and time of the sighting and report this information as soon as possible to the cognizant regional environmental coordinator. All whale strikes must be reported immediately. This report shall include the date, time, and location of the strike; vessel course and speed; operations being conducted by the vessel; weather conditions, visibility, and sea state; description of the whale; narrative of incident; and indication of whether photos/videos were taken. Navy personnel are encouraged to take photos whenever possible.

(D) Specific mitigation measures related to activities occurring within the critical habitat include the following:

(1) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when change of course would create an imminent and serious threat to person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(2) When transiting within the critical habitat or associated area of concern, vessels shall use extreme caution and operate at a safe speed (the minimum speed at which mission goals or safety will not be compromised) so as to be able to avoid collisions with North Atlantic right whales and other marine mammals, and stop within a distance appropriate to the circumstances and conditions.

(3) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than one week old.

(4) Ships transiting in the Cape Cod Bay and Great South Channel critical habitats shall obtain information on recent whale sightings in the vicinity of the critical habitat. Any vessel operating in the vicinity of a North Atlantic right whale shall consider additional speed reductions as per Rule 6 of International Navigational Rules.

(4) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is injured or killed as a result of the proposed Navy training activities (*e.g.*, instances in which it is clear that munitions explosions caused death), the Navy shall suspend its activities immediately and report such incident to NMFS.

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5-in Explosive Rounds):

(A) This activity shall only occur in Areas BB and CC, or in similar areas that will not result in marine mammal takes exceeding the amount indicated in §216.11(c).

(B) During North Atlantic right whale calving season no explosive ordnance shall be used.

(C) Pre-exercise monitoring of the target area shall be conducted with “Big Eyes” prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships shall maintain a lookout dedicated to visually searching for marine mammals 180° along the ship track line and 360° at each buoy drop-off location.

(D) “Big Eyes” on the ship shall be used to monitor a 600 yard (548 m) buffer zone for marine mammals during naval-gunfire events.

(E) Ships shall not fire on the target if any marine mammals are detected within or approaching the 600 yd (548 m) buffer zone until the area is cleared. If marine mammals are present, operations shall be suspended. Visual observation shall occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

(F) Post-exercise monitoring of the entire target area shall take place with “Big Eyes” and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

(G) FIREX with IMPASS shall take place during daylight hours only.

(H) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(I) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

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(J) No firing shall occur if marine mammals are detected within 70 yards (64 m) of the vessel.

(ii) Air-to-Surface Missile Exercises (Explosive):

(A) Aircraft shall initially survey the intended ordnance impact area for marine mammals.

(B) During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of marine mammals transiting the range.

(C) Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed.

(D) Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

(iii) Mine Neutralization Training Involving Underwater Detonations (up to and including 20-lb charges):

(A) This activity shall only occur in Undet North and Undet South of the JAX Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 700 yd (640 m) radius from detonation location for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever assets are available.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear of marine mammals for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear of marine mammals for 30 minutes prior to detonation.

(F) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet.

(G) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(H) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

(iv) Small Arms Training—Explosive hand grenades (such as the MK3A2 grenades):

(A) Lookouts shall visually survey for marine mammals prior to and during exercise.

(B) A 200 yd (182 m) radius buffer zone shall be established around the intended target. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

[74 FR 28365, June 15, 2009, as amended at 76 FR 30554, May 264, 2011; 77 FR 4923, Feb. 1, 2012]

### §218.14 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §216.106 of this chapter and §218.16 for activities described in §218.10(b) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in §218.10(b) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in §218.10(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the JAX Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below:

(1) Vessel or aerial surveys:

(i) The Holder of this Authorization shall visually survey a minimum of 2 explosive events per year, one of which shall be a multiple detonation event. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs).

(ii) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1-2 days prior to, during (if reasonably safe), and 1-5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (*i.e.*, the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

- (A) Location of sighting;
- (B) Species (if not possible, indicate whale, dolphin or pinniped);
- (C) Number of individuals;
- (D) Whether calves were observed;
- (E) Initial detection sensor;
- (F) Length of time observers maintained visual contact with marine mammal;
- (G) Wave height;
- (H) Visibility;
- (I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;
- (J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);
- (K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming *etc.*), including speed and direction;
- (L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munition type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys, the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array shall have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) As required in § 218.14(c)(1), MMOs selected for aerial or vessel survey shall be placed on a Navy platform during one of the explosive exercises being monitored per year, the other designated exercise shall be monitored by the Navy lookouts/watchstanders.

(ii) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of

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travel relative to the Navy platform, and distance first observed. Information collected by MMOs shall be the same as those collected by Navy lookout/watchstanders described in §218.14(c)(1)(iv).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan.

(5) A method for standardizing data collection for JAX Range Complex and across range complexes.

(e) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual JAX Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the JAX Range Complex Monitoring Plan. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be

gathered, the MMOs collecting marine mammal data pursuant to the JAX Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in §218.14(g). The JAX Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from JAX Range Complex and multiple range complexes.

(g) Annual JAX Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(i) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the JAX Range Complex.

(ii) Total annual expended/detonated rounds (missiles, bombs, *etc.*) for each explosive type.

(h) JAX Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the JAX Range Complex exercises for which annual reports are required (Annual JAX Range Complex Exercise Reports and JAX Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (May 2013), covering activities that have occurred through December 1, 2012.

(i) The Navy shall respond to NMFS' comments and requests for additional information or clarification on the JAX Range Complex Comprehensive Report, the Annual JAX Range Complex Exercise Report, or the Annual JAX Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or

three months after the submittal of the draft if NMFS does not comment by then.

(j) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

#### **§ 218.15 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.10(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.16 or a renewal under § 218.17.

#### **§ 218.16 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in § 218.17 and modification conditions in § 218.18.

(b) Each Letter of Authorization will set forth:

- (1) Permissible methods of incidental taking;
- (2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and
- (3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

#### **§ 218.17 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.16 for the activity identified in § 218.10(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.15 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Timely receipt of the monitoring reports required under § 218.14; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under § 218.13 and the Letter of Authorization issued under § 216.106 of this chapter and § 218.16, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.17 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to

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modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from JAX Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§218.14(j)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§218.14(d)).

(4) Results from specific stranding investigations (either from the JAX Range Complex Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

## §218.18 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §216.106 of this chapter and §218.16 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.17, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.11(b), a Letter of Authorization issued pursuant to §216.106 of this chapter and §218.16 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

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### Subpart C—Taking Marine Mammals Incidental to U.S. Navy Training in the Cherry Point Range Complex

SOURCE: 74 FR 28385, June 15, 2009, unless otherwise noted.

#### §218.20 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Cherry Point Range Complex Operation Area (OPAREA), which is located along the southern east coast of the U.S., as stated in the Navy's letter of authorization application. The coordinates of the Cherry Point Range Complex OPAREA are: 35°30' N, 75°25' W; 34°14' N, 73°57' W; 32°12' N, 76°49' W; 32°20' N, 77°20' W; 33°10' N, 77°31' W; and 34°23'30" N, 77°30' W; then along the 3 nm from and parallel to the shoreline.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the explosive munitions, or similar explosive types, indicated in paragraph (c)(1)(i) of this section conducted as part of the Navy training events, or similar training events, indicated in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:

(A) AGM-114 (Hellfire missile);

(B) Tube-launched Optically tracked Wire-guided (TOW) missile;

(C) Mine Neutralization (20 lb NEW charges); and

(D) 5" Naval Gunfire.

(ii) Training Exercises:

(A) Mine Neutralization (20 lb NEW charges)—up to 100 exercises over the course of 5 years (an average of 20 per year);

(B) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile)—up to 40 exercises over the course of 5 years (an average of 8 per year);

(C) Missile Exercise (MISSILEX) (Air-to-Surface; TOW)—up to 40 exercises over the course of 5 years (an average of 8 per year); and

(D) FIREX with IMPASS—up to 10 exercises over the course of 5 years (an average of 2 per year).

(2) [Reserved]

(d) Regulations are effective February 1, 2012, through June 4, 2014.

(e) The taking of marine mammals may be authorized in an LOA for the explosive types and activities, or similar explosives and activities, listed in § 218.20(c) should the amounts (e.g., number of exercises) vary from those estimated in § 218.20(c), provided that the variation does not result in exceeding the amount of take indicated in § 218.21(c).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

#### § 218.21 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.26, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.20(b), provided the activity is in compliance with all terms, conditions, and requirements of this Subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.20(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.20(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);

(ii) Pantropical spotted dolphin (*Stenella attenuata*)—100 (an average of 20 annually);

(iii) Clymene dolphin (*S. clymene*)—150 (an average of 30 annually);

(iv) Atlantic spotted dolphin (*S. frontalis*)—100 (an average of 20 annually);

(v) Striped dolphin (*S. coeruleoalba*)—100 (an average of 20 annually);

(vi) Spinner dolphin (*S. longirostris*)—15 (an average of 3 annually);

(vii) Risso's dolphin (*Grampus griseus*)—150 (an average of 30 annually);

(viii) Common dolphin (*Delphinus delphis*)—100 (an average of 20 annually);

(ix) Atlantic white-sided dolphin (*Lagenorhynchus acutus*)—100 (an average of 20 annually);

(x) Pilot whales (*Globicephala* sp.)—100 (an average of 20 annually);

(xi) Dwarf or pygmy sperm whales (*Kogia* sp.)—15 (an average of 3 annually);

(xii) Beaked whales—100 (an average of 20 annually);

(xiii) Fraser's dolphin (*Lagenodelphis hosei*)—15 (an average of 3 annually);

(xiv) Melon-headed whale (*Peponocephala electra*)—15 (an average of 3 annually);

(xv) Pygmy killer whale (*Feresa attenuate*)—15 (an average of 3 annually);

(xvi) Killer whale (*Orcinus orca*)—15 (an average of 3 annually);

(xvii) Minke whales (*Balaenoptera acutorostrata*)—15 (an average of 3 annually).

(2) [Reserved]

#### § 218.22 Prohibitions.

Notwithstanding takings contemplated in § 218.21 and authorized by a Letter of Authorization issued under §§ 216.106 of this chapter and 218.26, no person in connection with the activities described in § 218.20 may:

(a) Take any marine mammal not specified in § 218.21(c);

(b) Take any marine mammal specified in § 218.21(c) other than by incidental take as specified in § 218.21(b)(1) and (2);

(c) Take a marine mammal specified in § 218.21(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under §§ 216.106 of this chapter and 218.26.



**§ 218.23 Mitigation.**

(a) When conducting training activities identified in § 218.20(c), the mitigation measures contained in the Letters of Authorization issued under §§ 216.106 of this chapter and 218.26 must be implemented. These mitigation measures include, but are not limited to:

(1) *General Maritime Measures:*

(i) *Personnel Training—Lookouts:*

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses

shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) *Operating Procedures and Collision Avoidance:*

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a “safe speed” (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and

can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (*e.g.*, safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements. (i) The Navy shall coordinate with the local NMFS Stranding

Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during training activities or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable to Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration: The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and the Cherry Point OPAREA.

(i) Mid-Atlantic, Offshore of the Eastern United States:

(A) All Navy vessels are required to use extreme caution and operate at a slow, safe speed (at a speed that does not compromise safety of navigation) consistent with mission and safety during the months indicated below and within a 37 km (20 NM) arc (except as noted) of the specified associated reference points:

(1) South and East of Block Island (37 km (20 NM) seaward of line between 41–4.49° N. lat. 071–51.15° W. long. and 41–18.58° N. lat. 070–50.23° W. long.): Sept–Oct and Mar–Apr.

(2) New York/New Jersey (40–30.64° N. lat. 073–57.76° W. long.): Sep–Oct and Feb–Apr.

(3) Delaware Bay (Philadelphia) (38–52.13° N. lat. 075–1.93° W. long.): Oct–Dec and Feb–Mar.

(4) Chesapeake Bay (Hampton Roads and Baltimore) (37–1.11° N. lat. 075–57.56° W. long.): Nov–Dec and Feb–Apr.

(5) North Carolina (34–41.54° N. lat. 076–40.20° W. long.): Dec–Apr.

(6) South Carolina (33–11.84° N. lat. 079–8.99° W. long. and 32–43.39° N. lat. 079–48.72° W. long.): Oct–Apr.

(B) During the months indicated in paragraph (a)(3)(i)(A) of this section, Navy vessels shall practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified in paragraph (a)(3)(i)(A) of this section.

(C) All surface units transiting within 56 km (30 NM) of the coast in the mid-Atlantic shall ensure at least two watchstanders are posted, including at least one lookout who has completed required MSAT training.

(D) Navy vessels shall not knowingly approach any whale head on and shall maneuver to keep at least 457 m (1,500 ft) away from any observed whale, consistent with vessel safety.

(ii) Southeast Atlantic, Offshore of the Eastern United States—for the purposes of the measures below (paragraphs (a)(3)(ii)(A) & (B) of this section), the “southeast” encompasses sea space from Charleston, South Carolina, southward to Sebastian Inlet, Florida, and from the coast seaward to 148 km (80 NM) from shore. North Atlantic right whale critical habitat is the area from 31–15° N. lat. to 30–15° N. lat. extending from the coast out to 28 km (15 NM), and the area from 28–00° N. lat. to 30–15° N. lat. from the coast out to 9 km (5 NM). All mitigation measures described here that apply to the critical habitat apply from November 15–April 15 and also apply to an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries.

(A) Prior to transiting or training in the critical habitat or associated area of concern (AAOC), ships shall contact Fleet Area Control and Surveillance Facility, Jacksonville, to obtain latest whale sighting and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised) and path of intended movement. Subs shall contact Commander, Submarine Group Ten for similar information.

(B) The following specific mitigation measures apply to activities occurring within the North Atlantic right whale critical habitat and an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries:

(1) When transiting within the critical habitat or associated area of concern, vessels shall exercise extreme caution and proceed at a slow safe speed. The speed shall be the slowest safe speed that is consistent with mission, training and operations.

(2) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than 12 hours old. Circumstances could arise where, in order to avoid North Atlantic right whale(s), speed reductions could mean vessels must reduce speed to a minimum at which it can safely keep on course or vessels could come to an all stop.

(3) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel’s safety is threatened, such as when a change of course would create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(4) During the North Atlantic right whale calving season, north-south transits through the critical habitat are prohibited.

(5) Ships, surfaced subs, and aircraft shall report any whale sightings to Fleet Area Control and Surveillance Facility, Jacksonville, by the quickest and most practicable means. The sighting report shall include the time, latitude/longitude, direction of movement and number and description of whale (i.e., adult/calf).

(6) Naval vessel operations in the North Atlantic right whale critical habitat and AAOC during the calving season shall be undertaken during daylight and periods of good visibility, to the extent practicable and consistent with mission, training, and operation. When operating in the critical habitat and AAOC at night or during periods of poor visibility, vessels shall operate as if in the vicinity of a recently reported NARW sighting.

(iii) Northeast Atlantic, Offshore of the Eastern United States:

(A) Prior to transiting the Great South Channel or Cape Cod Bay critical habitat areas, ships shall obtain the latest North Atlantic right whale sightings and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised). The Great South

Channel critical habitat is defined by the following coordinates: 41-00° N. lat., 69-05° W. long.; 41-45° N. lat., 69-45° W. long.; 42-10° N. lat., 68-31° W. long.; 41-38° N. lat., 68-13° W. long. The Cape Cod Bay critical habitat is defined by the following coordinates: 42-04.8° N. lat., 70-10° W. long.; 42-12° N. lat., 70-15° W. long.; 42-12° N. lat., 70-30° W. long.; 41-46.8° N. lat., 70-30° W. long.

(B) Ships, surfaced subs, and aircraft shall report any North Atlantic right whale sightings (if the whale is identifiable as a right whale) off the northeastern U.S. to Patrol and Reconnaissance Wing (COMPATRECONWING). The report shall include the time of sighting, lat/long, direction of movement (if apparent) and number and description of the whale(s).

(C) Vessels or aircraft that observe whale carcasses shall record the location and time of the sighting and report this information as soon as possible to the cognizant regional environmental coordinator. All whale strikes must be reported. This report shall include the date, time, and location of the strike; vessel course and speed; operations being conducted by the vessel; weather conditions, visibility, and sea state; description of the whale; narrative of incident; and indication of whether photos/videos of the whale were taken. Navy personnel are encouraged to take photos of the whale whenever possible.

(D) Specific mitigation measures related to activities occurring within the critical habitat include the following:

(1) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when change of course would create an imminent and serious threat to person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(2) When transiting within the critical habitat or associated area of concern, vessels shall use extreme caution and operate at a safe speed (the minimum speed at which mission goals or safety will not be compromised) so as to be able to avoid collisions with

North Atlantic right whales and other marine mammals, and stop within a distance appropriate to the circumstances and conditions.

(3) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than one week old.

(4) Ships transiting in the Cape Cod Bay and Great South Channel critical habitats shall obtain information on recent whale sightings in the vicinity of the critical habitat. Any vessel operating in the vicinity of a North Atlantic right whale shall consider additional speed reductions as per Rule 6 of International Navigational Rules.

(4) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the death), the Navy shall suspend its activities immediately and report the incident to NMFS.

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5-in Explosive Rounds)

(A) This activity shall only occur in Areas 4/5 and 13/14, or in similar areas that will not result in marine mammal takes exceeding the amount indicated in § 218.21(c).

(B) Pre-exercise monitoring of the target area shall be conducted with “Big Eyes” prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships shall maintain lookouts dedicated to visually searching for marine mammals 180° along the ship track line and 360° at each buoy drop-off location.

(C) “Big Eyes” on the ship shall be used to monitor a 600-yd (548-m) buffer zone for marine mammals during naval-gunfire events.

(D) Ships shall not fire on the target if any marine mammals are detected within or approaching the 600-yd (548-m) buffer zone. If marine mammals are present, operations must be suspended. Visual observation shall occur for approximately 45 min, or until the animal has been observed to have cleared the area and is heading away from the

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buffer zone. At such time as animals have cleared the area and are heading away from the buffer zone, the Navy may begin or resume operations.

(E) Post-exercise monitoring of the entire target area shall take place with “Big Eyes” and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

(F) The naval gunfire shall take place during daylight hours only.

(G) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(H) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

(I) No firing shall occur if marine mammals are detected within 70 yd (64 m) of the vessel.

(ii) Air-to-Surface Missile Exercises (Explosive):

(A) Aircraft shall initially survey the intended ordnance impact area for marine mammals.

(B) During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of marine mammals transiting the range.

(C) Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed.

(D) Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

(iii) Mine Neutralization Training Involving Underwater Detonations (up to and including 20-lb charges):

(A) This activity shall only occur in W-15 of the Cherry Point Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 700 yd (640 m) radius from detonation location for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever operationally feasible.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear of marine mammals for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear of marine mammals for 30 minutes prior to detonation.

(F) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet.

(G) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(H) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

### §218.24 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §216.106 of this chapter and §218.26 for activities described in §218.20(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in §218.20(c) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in §218.21(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the Cherry Point Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Vessel or aerial surveys.

(i) The Holder of this Authorization shall visually survey a minimum of 1 explosive event per year. If possible,

the event surveyed shall be one involving multiple detonations. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs). If it is impossible to conduct the required surveys due to lack of training exercises, the missed annual survey requirement shall roll into the subsequent year to ensure that the appropriate number of surveys (i.e., total of five) occurs over the 5-year period of effectiveness of this subject.

(ii) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1-2 days prior to, during (if reasonably safe), and 1-5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (i.e., the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel based surveys, a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

- (A) Location of sighting;
- (B) Species (if not possible, indicate whale, dolphin or pinniped);
- (C) Number of individuals;
- (D) Whether calves were observed;
- (E) Initial detection sensor;
- (F) Length of time observers maintained visual contact with marine mammal;
- (G) Wave height;
- (H) Visibility;
- (I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;
- (J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);
- (K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;

(L) Resulting mitigation implementation—Indicate whether explosive det-

onations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys, the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array should have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) As required in § 218.24(c)(1), MMOs who are selected for aerial or vessel surveys shall be placed on a Navy platform during one of the explosive exercises being monitored per year, the other designated exercise shall be monitored by the Navy lookouts/watchstanders.

(ii) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. Information collected by MMOs should be the same as those collected by Navy lookout/watchstanders described in §218.24(c)(1)(iv).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan,

(5) A method for standardizing data collection for Cherry Point Range Complex and across range complexes,

(e) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the

condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual Cherry Point Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the Cherry Point Range Complex Monitoring Plan. Data collection methods shall be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the Cherry Point Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the data required in §218.24(g). The Cherry Point Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from Cherry Point Range Complex and multiple range complexes.

(g) Annual Cherry Point Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(1) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the Cherry Point Range Complex.

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(h) Cherry Point Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the Cherry Point Range Complex exercises for which annual reports are required (Annual Cherry Point Range Complex Exercise Reports and Cherry Point Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the

fourth year of the rule (May 2013), covering activities that have occurred through December 1, 2012.

(i) The Navy shall respond to NMFS comments and requests for additional information or clarification on the Cherry Point Range Complex Comprehensive Report, the Annual Cherry Point Range Complex Exercise Report, or the Annual Cherry Point Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(j) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

#### **§ 218.25 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.20(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.26 or a renewal under § 218.27.

#### **§ 218.26 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in § 218.27 and the modification conditions in § 218.28.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

#### **§ 218.27 Renewal of Letters of Authorization and Adaptive Management.**

(a) A Letter of Authorization issued under § 216.106 and § 218.26 of this chapter for the activity identified in § 218.20(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.25 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.24; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.23 and the Letter of Authorization issued under §§ 216.106 and 218.26 of this chapter, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.27 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and



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(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from Cherry Point Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§218.24(j)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§218.24(d))).

(4) Results from specific stranding investigations (either from the Cherry Point Range Complex Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[74 FR 28343, June 15, 2009, as amended at 77 FR 4923, Feb. 1, 2012]

## § 218.28 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§216.106 and 218.26 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has

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been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.27, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.20(b), a Letter of Authorization issued pursuant to §§216.106 and 218.26 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

## Subpart D—Taking Marine Mammals Incidental to U.S. Navy Training in the Gulf of Mexico Range Complex

SOURCE: 76 FR 9260, Feb. 17, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 9260, Feb. 17, 2011, subpart D was added, effective Feb. 17, 2011 to Feb. 17, 2016.

## § 218.30 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the GOMEX Range Complex Operation Areas (OPAREAs), which is located along the Gulf of Mexico coast of the U.S. described in Figures 1 and 2 of the LOA application and consists of the BOMBEX Hotbox (surface and subsurface waters), located off the Alabama and Florida coast, south of NAS Pensacola, and underwater detonation (UNDET) Area E3 (surface and subsurface waters), located within the territorial waters off Padre Island, Texas, near Corpus Christi NAS.

(1) The northernmost boundary of the BOMBEX Hotbox is located 23 nm (42.6 km) from the coast of the Florida panhandle at latitude 30° N, the eastern

boundary is approximately 200 nm (370.4 km) from the coast of the Florida peninsula at longitude 86°48' W.

(2) The UNDET Area E3 is a defined surface and subsurface area located in the waters south of Corpus Christi NAS and offshore of Padre Island, Texas. The westernmost boundary is located 7.5 nm (13.9 km) from the coast of Padre Island at 97°9'33" W and 27°24'26" N at the Westernmost corner. It lies entirely within the territorial waters (0 to 12 nm, or 0 to 22.2 km) of the U.S. and the majority of it lies within Texas state waters (0 to 9 nm, or 0 to 16.7 km). It is a very shallow water training area with depths ranging from 20 to 26 m.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the explosive munitions, or similar explosive types, indicated in paragraph (c)(1)(i) of this section conducted as part of the Navy training events, or similar training events, indicated in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:

(A) MK-83 (1,000 lb High Explosive bomb);

(B) MK3A2 anti-swimmer concussion grenades (0.5 lbs NEW).

(ii) Training Events:

(A) BOMBEX (Air-to-Surface)—up to 5 events over the course of 5 years (an average of 1 event per year, with 4 bombs in succession for each event);

(B) Small Arms Training with MK3A2 anti-swimmer concussion grenades—up to 30 events over the course of 5 years (an average of 6 events per year, with up to 10 live grenades authorized per event, but no more than 20 live grenades will be used per year).

(2) [Reserved]

(d) Regulations are effective February 1, 2012, through February 17, 2016.

(e) The taking of marine mammals may be authorized in an LOA for the explosive types and activities, or similar explosives and activities, listed in § 218.30(c) should the amounts (e.g., number of exercises) vary from those estimated in § 218.30(c), provided that the variation does not result in exceeding

the amount of take indicated in § 218.31(c).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4924, Feb. 1, 2012]

#### § 218.31 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.36, the Holder of the Letter of Authorization may incidentally take marine mammals within the area described in § 218.30(b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.30(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.30(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Sperm whale (*Physeter macrocephalus*)—25 (an average of 5 annually);

(ii) Beaked whales—100 (an average of 20 annually);

(iii) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);

(iv) Pantropical spotted dolphin (*Stenella attenuata*)—130 (an average of 26 annually);

(v) Clymene dolphin (*S. clymene*)—100 (an average of 20 annually);

(vi) Atlantic spotted dolphin (*S. frontalis*)—100 (an average of 20 annually);

(vii) Spinner dolphin (*S. longirostris*)—135 (an average of 27 annually);

(viii) Striped dolphin (*S. coeruleoalba*)—100 (an average of 20 annually);

(ix) Risso's dolphin (*Grampus griseus*)—150 (an average of 30 annually);

(x) Melon-headed whales (*Peponocephala electra*)—100 (an average of 20 annually);

(xi) False killer whale (*Pseudorca crassidens*)—50 (an average of 10 annually);

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(xii) Fraser's dolphin (*Lagenodelphis hosei*)—100 (an average of 20 annually);  
(xiii) Pygmy or dwarf sperm whales (*Kogia* sp.)—100 (an average of 20 annually);

(xiv) Pygmy killer whale (*Ferresia attenuata*)—50 (an average of 10 annually);

(xv) Rough-toothed dolphin (*Steno bredanensis*)—100 (an average of 20 annually);

(xvi) Short-finned pilot whale (*Globicephala macrorhynchus*)—100 (an average of 20 annually).

(2) Level A Harassment (injury):

(i) Pantropical spotted dolphin—5 (an average of 1 annually);

(ii) Spinner dolphin—5 (an average of 1 annually);

### § 218.32 Prohibitions.

Notwithstanding takings contemplated in § 218.31 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.36, no person in connection with the activities described in § 218.30 may:

(a) Take any marine mammal not specified in § 218.31(c);

(b) Take any marine mammal specified in § 218.31(c) other than by incidental take as specified in § 218.31(c)(1) and (2);

(c) Take a marine mammal specified in § 218.31(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.36.

### § 218.33 Mitigation.

(a) When conducting training activities identified in § 218.30(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.36 must be implemented. These mitigation measures include, but are not limited to:

(1) General Maritime Measures:

(i) Personnel Training—Lookouts:

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews

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shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures & Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed" (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (*e.g.*, safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements:

(i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is injured or killed as a result

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of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the death), the Navy shall suspend its activities immediately and report such incident to NMFS.

(i) Air-to-Surface At-Sea Bombing Exercises (1,000-lbs explosive bombs):

(A) This activity shall only occur in the W-155A/B (hot box) area, or in similar areas that will not result in marine mammal takes exceeding the amount indicated in §218.31(c).

(B) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(C) A buffer zone of a 5,100-yard (4,663-m) radius shall be established around the intended target zone. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(D) At-sea BOMBEXs using live ordnance shall occur during daylight hours only.

(ii) Small Arms Training—Explosive hand grenades (such as the MK3A2 grenades):

(A) Lookouts shall visually survey for marine mammals prior to and during exercise.

(B) A 200-yd (182-m) radius buffer zone shall be established around the intended target. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(b) [Reserved]

[74 FR 28343, June 15, 2009, as amended at 77 FR 4924, Feb. 1, 2012]

### §218.34 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §216.106 of this chapter and §218.36 for activities described in §218.30(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if

the specified activity identified in §218.30(c) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in §218.31(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the GOMEX Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Vessel or aerial surveys.

(i) The Holder of this Authorization shall visually survey a minimum of 1 explosive event per year. One of the vessel or aerial surveys should involve professional trained marine mammal observers (MMOs). If it is impossible to conduct the required surveys due to lack of training exercises, the missed annual survey requirement shall roll into the subsequent year to ensure that the appropriate number of surveys (*i.e.*, total of five) occurs over the 5-year period of effectiveness of this subject.

(ii) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (*i.e.*, the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

- (A) Location of sighting;
- (B) Species (if not possible, indicate whale, dolphin or pinniped);
- (C) Number of individuals;
- (D) Whether calves were observed;
- (E) Initial detection sensor;
- (F) Length of time observers maintained visual contact with marine mammal;
- (G) Wave height;
- (H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);

(K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array should have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) As required in § 218.34(c)(1), MMOs who are selected for aerial or vessel surveys shall, to the extent practicable, be placed on a Navy platform during the exercises being monitored.

(ii) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise. Instead, MMOs should be employed during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. Information collected by MMOs should be the same as those collected by the survey team described in § 218.34(c)(1)(iv).

(d) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(e) Annual GOMEX Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the GOMEX Range Complex Monitoring Plan. Data collection methods shall be standardized across

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range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the GOMEX Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in § 218.34(c)(1)(iv). The GOMEX Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from GOMEX Range Complex and multiple range complexes.

(f) Annual GOMEX Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(1) Total annual number of each type of explosive exercise (of those identified as part of the “specified activity” in this final rule) conducted in the GOMEX Range Complex.

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(g) GOMEX Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the GOMEX Range Complex exercises for which annual reports are required (Annual GOMEX Range Complex Exercise Reports and GOMEX Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (February 2015), covering activities that have occurred through August 1, 2014.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the GOMEX Range Complex Comprehensive Report, the Annual GOMEX Range Complex Exercise Report, or the Annual GOMEX Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These re-

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ports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

### § 218.35 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.30(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.36 or a renewal under § 218.37.

### § 218.36 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in § 218.37 and the modification conditions in § 218.38.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[74 FR 28343, June 15, 2009, as amended at 77 FR 4924, Feb. 1, 2012]

**§ 218.37 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.36 for the activity identified in § 218.30(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.35 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Timely receipt of the monitoring reports required under § 218.34; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under § 218.33 and the Letter of Authorization issued under § 216.106 of this chapter and § 218.36, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.37 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to

modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from GOMEX Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.34(j)).

(3) Results from specific stranding investigations (either from the GOMEX Range Complex Study Area or other locations).

(4) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(5) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[74 FR 28343, June 15, 2009, as amended at 77 FR 4924, Feb. 1, 2012]

**§ 218.38 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 218.36 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.37, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.30(b), a Letter of Authorization issued pursuant to §§ 216.106 and 218.36 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

**Subparts E-K [Reserved]**



**Subpart L—Taking and Importing Marine Mammals; U.S. Navy’s Mariana Islands Training Range Complex (MIRC)**

SOURCE: 75 FR 45547, Aug. 3, 2010, unless otherwise noted.

EFFECTIVE DATE NOTE: At 75 FR 45547, Aug. 3, 2010, Subpart L was added, effective Aug. 3, 2010 through Aug. 3, 2015.

**§ 218.100 Specified activity and specified geographical area.**

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) if it occurs within the Mariana Islands Range Complex (MIRC) Study Area (as depicted in Figure 1–1 in the Navy’s application for MIRC), which is bounded by a pentagon with the following five corners: 16°46’29.3376” N. lat., 138°00’59.835” E. long.; 20°02’24.8094” N. lat., 140°10’13.8642” E. long.; 20°3’27.5538” N. lat., 149°17’41.0388” E. long.; 7°0’30.0702” N. lat., 149°16’14.8542” E. long; and 6°59’24.633” N. lat, 138°1’29.7228” E. long.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources, or similar sources, for Navy training, maintenance, or research, development, testing, and evaluation (RDT&E) (estimated amounts below):

(i) AN/SQS–53 (hull-mounted active sonar)—up to 10865 hours over the course of 5 years (an average of 2173 hours per year);

(ii) AN/SQS–56 (hull-mounted active sonar)—up to 705 hours over the course of 5 years (an average of 141 hours per year);

(iii) AN/SSQ–62 (Directional Command Activated Sonobuoy System (DICASS) sonobuoys)—up to 8270

sonobuoys over the course of 5 years (an average of 1654 sonobuoys per year);

(iv) AN/AQS–22 (helicopter dipping sonar)—up to 2,960 dips over the course of 5 years (an average of 592 dips per year);

(v) AN/BQQ–10 (submarine hull-mounted sonar)—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(vi) MK–48, MK–46, or MK–54 (torpedoes)—up to 200 torpedoes over the course of 5 years (an average of 40 torpedoes per year);

(vii) AN/SSQ–110 (IEER)—up to 530 buoys deployed over the course of 5 years (an average of 106 per year);

(viii) AN/SSQ–125 (AEER)—up to 530 buoys deployed over the course of 5 years (an average of 106 per year);

(ix) Range Finders—up to 1,400 hours over the course of 5 years (an average of 280 hours per year); and

(x) PUTR Transponder—up to 1,400 hours over the course of 5 years (an average of 280 hours per year).

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section, or similar explosives, conducted as part of the training exercises indicated in paragraph (c)(2)(ii) of this section:

(i) Underwater Explosives (Net Explosive Weight (NEW)):

(A) 5” Naval Gunfire (9.5 lbs NEW);

(B) 76 mm rounds (1.6 lbs NEW);

(C) Maverick (78.5 lbs NEW);

(D) Harpoon (448 lbs NEW);

(E) MK–82 (238 lbs NEW);

(F) MK–83 (574 lbs NEW);

(G) MK–84 (945 lbs NEW);

(H) MK–48 (851 lbs NEW);

(I) Demolition Charges (10 lbs NEW);

(J) AN/SSQ–110A (IEER explosive sonobuoy—5 lbs NEW);

(K) Hellfire (16.5 lbs NEW);

(L) GBU 38/32/31.

(ii) Training Events:

(A) Gunnery Exercises (S–S GUNEX)—up to 60 exercises over the course of 5 years (an average of 12 per year);

(B) Bombing Exercises (BOMBEX)—up to 20 exercises over the course of 5 years (an average of 4 per year);

(C) Sinking Exercises (SINKEX)—up to 10 exercises over the course of 5 years (an average of 2 per year);

(D) Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—up to 530 deployments over the course of 5 years (an average of 106 per year);

(E) Demolitions—up to 250 over the course of 5 years (an average of 50 per year); and

(F) Missile exercises (A–S MISSILEX)—up to 10 exercises over the course of 5 years (an average of 2 per year).

(d) The taking of marine mammals may also be authorized in an LOA for the activities and sources listed in § 218.100(c) should the amounts (*i.e.*, hours, dips, number of exercises) vary from those estimated in § 218.100(c), provided that the variation does not result in exceeding the amount of take indicated in § 218.102.

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

#### § 218.101 Effective dates.

Amended regulations are effective February 1, 2012, through August 3, 2015.

[77 FR 4924, Feb. 1, 2012]

#### § 218.102 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.107 of this chapter, the Holder of the Letter of Authorization (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in § 218.100(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 218.100(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.100(c) is limited to the species listed in this paragraph (4), (5), and (6) of this section (c) by the indicated method of take and the indicated number of times (estimated based on the authorized amounts of sound source operation), but with the following allow-

ances for annual variation in activities:

(1) In any given year, annual take, by harassment, of any species of marine mammal may not exceed the amount identified in paragraphs (b)(4) and (b)(5) of this section, for that species by more than 25% (a post-calculation/estimation of which must be provided in the annual LOA application);

(2) In any given year, annual take by harassment of all marine mammal species combined may not exceed the estimated total of all species combined, indicated in paragraphs (b)(4) and (b)(5) of this section, by more than 10%; and

(3) Over the course of the effective period of this subpart, total take, by harassment, of any species may not exceed the 5-year amounts indicated in paragraphs (b)(4) and (b)(5) of this section by more than 10%. A running calculation/estimation of takes of each species over the course of the years covered by the rule must be maintained.

(4) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—4,025 (an average of 805 annually);

(B) Fin whale (*Balaenoptera physalus*)—910 (an average of 182 annually);

(C) Blue whale (*Balaenoptera musculus*)—650 (an average of 130 annually);

(D) Sei whale (*Balaenoptera borealis*)—1,625 (an average of 325 annually);

(E) Minke whale (*Balaenoptera acutorostrata*)—2,225 (an average of 445 annually);

(F) Bryde’s whale (*Balaenoptera edeni*)—2,285 (an average of 457 annually); and

(G) Unidentified Baleanopterid whales—360 (an average of 72 annually).

(ii) Odontocetes:

(A) Sperm whales (*Physeter macrocephalus*)—4,120 (an average of 824 annually);

(B) Killer whale (*Orcinus orca*)—1,150 (an average of 230 annually);

(C) Pygmy or dwarf sperm whales (*Kogia breviceps* or *Kogia sima*)—33,530 (an average of 6,706 annually);

(D) Blainville’s beaked whales (*Mesoplodon densirostris*)—3,850 (an average of 770 annually);

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(E) Cuvier's beaked whales (*Ziphius cavirostris*)—18,140 (an average of 3,628 annually);

(F) Ginkgo-toothed beaked whales (*Mesoplodon ginkgodens*)—2,150 (an average of 430 annually);

(G) Longman's beaked whale (*Indopacetus pacificus*)—1,030 (an average of 206 annually);

(H) Short-finned pilot whale (*Globicephala macrorhynchus*)—11,370 (an average of 2,274 annually);

(I) Melon-headed whale (*Peponocephala electra*)—14,315 (an average of 2,863 annually);

(J) Pygmy killer whale (*Feresa attenuata*)—800 (an average of 160 annually);

(K) False killer whale (*Pseudorca crassidens*)—6,445 (an average of 1,289 annually);

(L) Striped dolphin (*Stenella coeruleoalba*)—44,290 (an average of 8,858 annually);

(M) Short-beaked common dolphin (*Delphinus delphis*)—4,715 (an average of 943 annually);

(N) Risso's dolphin (*Grampus griseus*)—33,865 (an average of 6,773 annually);

(O) Bottlenose dolphin (*Tursiops truncatus*)—855 (an average of 171 annually);

(P) Fraser's dolphin (*Lagenodelphis hosei*)—23,075 (an average of 4,615 annually);

(Q) Pantropical spotted dolphin (*Stenella attenuata*)—162,495 (an average of 32,499 annually);

(R) Rough-toothed dolphin (*Steno bredanensis*)—1,205 (an average of 241 annually);

(S) Spinner dolphin (*Stenella longirostris*)—10,720 (an average of 2,144 annually); and

(T) Unidentified delphinid—7,690 (an average of 1,538 annually).

(5) Level A Harassment:

(i) Sperm whale—5 (an average of 1 annually);

(ii) Pantropical spotted dolphin—5 (an average of 1 annually);

(6) Level A Harassment and/or mortality of no more than 10 beaked whales (total), of any of the species listed in § 218.102(c)(4)(ii)(D) through (G) over the course of the 5-year regulations.

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### § 218.103 Prohibitions.

No person in connection with the activities described in § 218.100 may:

(a) Take any marine mammal not specified in § 218.102(c);

(b) Take any marine mammal specified in § 218.102(c) other than by incidental take as specified in §§ 218.102(c)(1) and (c)(2);

(c) Take a marine mammal specified in § 218.102(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §§ 216.106 and 218.107 of this chapter.

### § 218.104 Mitigation.

(a) When conducting training and utilizing the sound sources or explosives identified in § 218.100(c), the mitigation measures contained in a Letter of Authorization issued under §§ 216.106 and 218.107 of this chapter must be implemented. These mitigation measures include, but are not limited to:

(1) Personnel Training:

(i) All commanding officers (COs), executive officers (XOs), lookouts, Officers of the Deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-submarine Warfare (ASW)/Mine Warfare (MIW) helicopter crews shall complete the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge lookouts shall complete both parts one and two of the MSAT; part two is optional for other personnel.

(ii) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968-D).

(iii) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced lookout. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying

that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as lookouts can be counted among required lookouts as long as supervisors monitor their progress and performance.

(iv) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

(v) All lookouts onboard platforms involved in ASW training events will review the NMFS-approved Marine Species Awareness Training material prior to use of MFAS.

(vi) All COs, XOs, and officers standing watch on the bridge will review the Marine Species Awareness Training material prior to a training event employing the use of MFAS/HFAS.

(2) General Operating Procedures (for all training types):

(i) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species protective measures.

(ii) COs shall make use of marine species detection cues and information to limit interaction with marine mammals to the maximum extent possible consistent with safety of the ship.

(iii) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

(iv) On surface vessels equipped with a multi-function active sensor, pedestal mounted "Big Eye" (20×110) binoculars shall be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(v) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accord-

ance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(vi) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(vii) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed", which means the speed at which the CO can maintain crew safety and effectiveness of current operational directives, so that the vessel can take action to avoid a collision with any marine mammal.

(viii) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and take all reasonable actions to avoid collisions and close interaction of naval assets and marine mammals. Such action may include changing speed and/or direction and are dictated by environmental and other conditions (*e.g.*, safety, weather).

(ix) Navy aircraft participating in exercises at-sea shall conduct and maintain surveillance for marine mammals as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(x) All marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate when it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(xi) Naval vessels will maneuver to keep at least 1,500 ft (500 yds) away from any observed whale in the vessel's path and avoid approaching whales head-on. These requirements do not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged activities, launching and recovering aircraft or landing craft, minesweeping activities, replenishment while underway and

towing activities that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale. Given rapid swimming speeds and maneuverability of many dolphin species, naval vessels would maintain normal course and speed on sighting dolphins unless some condition indicated a need for the vessel to maneuver.

(3) Operating Procedures (for Anti-submarine Warfare (ASW) Operations):

(i) On the bridge of surface ships, there shall always be at least three people on watch whose duties include observing the water surface around the vessel.

(ii) All surface ships participating in ASW training events shall have, in addition to the three personnel on watch noted in (i), at least two additional personnel on watch as lookouts at all times during the exercise.

(iii) Personnel on lookout and officers on watch on the bridge will have at least one set of binoculars available for each person to aid in the detection of marine mammals.

(iv) Personnel on lookout shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Officer of the Deck, since any object or disturbance (*e.g.*, trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine mammal that may need to be avoided.

(v) All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

(vi) During MFAS operations, personnel shall utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

(vii) Aircraft with deployed sonobuoys shall use only the passive capability of sonobuoys when marine mammals are detected within 200 yds (183 m) of the sonobuoy.

(viii) Helicopters shall observe/survey the vicinity of an ASW exercise for 10 minutes before the first deployment of active (dipping) sonar in the water.

(ix) Helicopters shall not dip their sonar within 200 yards of a marine mammal and shall cease pinging if a marine mammal closes within 200 yards after pinging has begun.

(x)(A) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 6 dB below normal operating levels if any detected marine mammals are within 1000 yards (914 m) of the sonar dome (the bow) (*i.e.*, limit to at most 229 dB for AN/SQS-53 and 219 dB for AN/SQS-56, etc.). Ships and submarines shall continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1000-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(B) When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 10 dB below normal operating levels if any detected marine mammals are within 500 yards (457 m) of the sonar dome (the bow). Ships and submarines shall continue to limit maximum ping levels by this 10-dB factor until the animal has been seen to leave the 500-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(C) When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission ceases if any detected marine mammals are within 200 yards (183 m) of the sonar dome (the bow). Sonar shall not resume until the animal has been seen to leave the 200-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (457 m) beyond the location of the last detection.

(D) Special conditions applicable for dolphins and porpoises only: If, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior.

(xi) Prior to start up or restart of active sonar, operators will check that the 1000-m Safety Zone radius around the sound source is clear of marine mammals.

(xii) Active sonar levels (generally)—Navy shall operate active sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

(xiii) Submarine sonar operators will review detection indicators of close-aboard marine mammals prior to the commencement of ASW training events involving MFAS.

(E) If the need for power-down should arise (as detailed in 218.114(a)(3)(x)) when the Navy is operating a hull-mounted or sub-mounted source above 235 dB (infrequent), the Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (*i.e.*, the first power-down will be to 229 dB, regardless of at what level above 235 dB active sonar was being operated).

(4) Operating Procedures for Underwater Detonations (up to 10-lb charges):

(i) Exclusion Zones—All demolitions and ship mine countermeasures training exercises involving the use of explosive charges must include exclusion zones for marine mammals to prevent physical and/or acoustic effects to those species. These exclusion zones shall extend in a 700-yard arc radius around the detonation site. Should a marine mammal be present within the surveillance area, the explosive event shall not be started until the animal leaves the area.

(ii) Pre-Exercise Surveys—For Demolition and Ship Mine Countermeasures Operations, pre-exercise surveys shall be conducted for 30 minutes prior to the commencement of the scheduled explosive event. The survey may be

conducted from the surface, by divers, and/or from the air, and personnel shall be alert to the presence of any marine mammal. Should such an animal be present within the survey area, the explosive event shall not be started until the animal voluntarily leaves the area. The Navy will ensure the area is clear of marine mammals for a full 30 minutes prior to initiating the explosive event. Personnel will record any marine mammal observations during the exercise as well as measures taken if species are detected within the exclusion zone.

(iii) Post-Exercise Surveys—Surveys within the same exclusion zone radius shall also be conducted within 30 minutes after the completion of the explosive event.

(iv) Reporting—If there is evidence that a marine mammal may have been stranded, injured or killed by the action, Navy training activities shall be immediately suspended and the situation immediately reported by the participating unit to the Officer in Charge of the Exercise (OCE), who will follow Navy procedures for reporting the incident to Commander, Pacific Fleet, Commander, Navy Region Marianas, Environmental Director, and the chain-of-command. The situation shall also be reported to NMFS (see Stranding Plan for details).

(5) Sinking Exercise:

(i) All weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

(ii) An exclusion zone with a radius of 1.0 nm (1.9 km) will be established around each target. An additional buffer of 0.5 nm (0.9 km) will be added to account for errors, target drift, and animal movements. Additionally, a safety zone, which will extend beyond the buffer zone by an additional 0.5 nm (0.9 km), shall be surveyed. Together, the zone extends out 2 nm (3.7 km) from the target.

(iii) A series of surveillance overflights shall be conducted within the 2-nm zone around the target, prior to and during the exercise, when feasible. Survey protocol shall be as follows:

(A) Overflights within the 2-nm zone around the target shall be conducted in a manner that optimizes the surface

area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

(B) All visual surveillance activities shall be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team will have completed the Navy's marine mammal training program for lookouts.

(C) In addition to the overflights, the 2-nm zone around the target shall be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring would be maintained throughout the exercise. Additionally, passive sonar onboard submarines may be utilized to detect any vocalizing marine mammals in the area. The OCE will be informed of any aural detection of marine mammals and will include this information in the determination of when it is safe to commence the exercise.

(D) On each day of the exercise, aerial surveillance of the 2-nm zone around the target shall commence 2 hours prior to the first firing.

(E) The results of all visual, aerial, and acoustic searches shall be reported immediately to the OCE. No weapons launches or firing may commence until the OCE declares this 2-nm zone around the target is free of marine mammals.

(F) If a marine mammal is observed within the 2-nm zone around the target, firing will be delayed until the animal is re-sighted outside the 2-nm zone around the target, or 30 minutes have elapsed. After 30 minutes, if the animal has not been re-sighted it can be assumed to have left the 2-nm zone around the target. The OCE will determine if the marine mammal is in danger of being adversely affected by commencement of the exercise.

(G) During breaks in the exercise of 30 minutes or more, the 2-nm zone around the target shall again be surveyed for any marine mammal. If ma-

rine mammals are sighted within the 2-nm zone around the target, the OCE shall be notified, and the procedures described in this section shall be followed.

(H) Upon sinking of the vessel, a final surveillance of the 2-nm zone around the target shall be monitored for 2 hours, or until sunset, to verify that no marine mammals were harmed.

(iv) Aerial surveillance shall be conducted using helicopters or other aircraft based on necessity and availability. The Navy has several types of aircraft capable of performing this task; however, not all types are available for every exercise. For each exercise, the available asset best suited for identifying objects on and near the surface of the ocean shall be used. These aircraft shall be capable of flying at the slow safe speeds necessary to enable viewing of marine vertebrates with unobstructed, or minimally obstructed, downward and outward visibility. The exclusion and safety zone surveys may be cancelled in the event that a mechanical problem, emergency search and rescue, or other similar and unexpected event preempts the use of one of the aircraft onsite for the exercise.

(v) Every attempt shall be made to conduct the exercise in sea states that are ideal for marine mammal sighting, Beaufort Sea State 3 or less. In the event of a 4 or above, survey efforts shall be increased within the 2-nm zone around the target. This shall be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

(vi) The exercise shall not be conducted unless the 2-nm zone around the target could be adequately monitored visually. Should low cloud cover or surface visibility prevent adequate visual monitoring as described previously, the exercise would be delayed until conditions improved, and all of the above monitoring criteria could be met.

(vii) In the event that any marine mammals are observed to be harmed in the area, a detailed description of the animal shall be taken, the location noted, and if possible, photos taken of the marine mammal. This information shall be provided to NMFS via the

Navy's regional environmental coordinator for purposes of identification (see the Stranding Plan for detail).

(viii) An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event shall be submitted to NMFS.

(6) Surface-to-Surface Gunnery (up to 5-inch Explosive Rounds):

(i) For exercises using targets towed by a vessel, target-towing vessels shall maintain a trained lookout for marine mammals when feasible. If a marine mammal is sighted in the vicinity, the tow vessel will immediately notify the firing vessel, which will suspend the exercise until the area is clear.

(ii) A 600 yard (585 m) radius buffer zone will be established around the intended target.

(iii) From the intended firing position, trained lookouts will survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

(iv) The exercise will be conducted only when the buffer zone is visible and marine mammals are not detected within it.

(7) Surface-to-Surface Gunnery (non-explosive rounds):

(i) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(ii) From the intended firing position, trained lookouts shall survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable.

(iii) If available, target towing vessels shall maintain a lookout (unmanned towing vessels will not have a lookout available). If a marine mammal is sighted in the vicinity of the exercise, the tow vessel shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(iv) The exercise shall be conducted only when the buffer zone is visible and marine mammals are not detected

within the target area and the buffer zone.

(8) Surface-to-Air Gunnery (Explosive and Non-explosive Rounds):

(i) Vessels will orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals.

(ii) Vessels will attempt to recover any parachute deploying aerial targets to the extent practicable (and their parachutes if feasible) to reduce the potential for entanglement of marine mammals.

(iii) Target towing aircraft shall maintain a lookout if feasible. If a marine mammal is sighted in the vicinity of the exercise, the tow aircraft will immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(9) Air-to-Surface Gunnery (Explosive and Non-explosive Rounds):

(i) A 200 yard (183 m) radius buffer zone will be established around the intended target.

(ii) If surface vessels are involved, lookout(s) will visually survey the buffer zone for marine mammals to and during the exercise.

(iii) Aerial surveillance of the buffer zone for marine mammals will be conducted prior to commencement of the exercise. Aerial surveillance altitude of 500 feet to 1,500 feet (152–456 m) is optimum. Aircraft crew/pilot will maintain visual watch during exercises. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(iv) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(10) Small Arms Training (Grenades, Explosive and Non-explosive Rounds)—Lookouts will visually survey for marine mammals. Weapons will not be fired in the direction of known or observed marine mammals.

(11) Air-to-Surface At-sea Bombing Exercises (explosive bombs and rockets):

(i) If surface vessels are involved, trained lookouts shall survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yds (914 m) of known or observed marine mammals.



(ii) A 1,000 yd (914 m) radius buffer zone shall be established around the intended target.

(iii) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the “wingman,” will clear the target area and perform the clearance and observation functions required before the dropping plane may release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(12) Air-to-Surface At-Sea Bombing Exercises (Non-explosive Bombs and Rockets):

(i) If surface vessels are involved, trained lookouts will survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yards (914 m) of known or observed or marine mammals.

(ii) A 1,000 yard (914 m) radius buffer zone will be established around the intended target.

(iii) Aircraft will visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 feet (457 m) or lower, if safe to do so, and at the slowest safe speed. When safety or other considerations require the release of weapons without the releasing pilot having visual sight of the target area, a second aircraft, the “wingman,” will clear the target area and perform the clearance and observation functions required before the dropping plane may

release its weapons. Both planes must have direct communication to assure immediate notification to the dropping plane that the target area may have been fouled by encroaching animals or people. The clearing aircraft will assure it has visual site of the target area at a maximum height of 1500 ft. The clearing plane will remain within visual sight of the target until required to clear the area for safety reasons. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise will be conducted only if marine mammals and are not visible within the buffer zone.

(13) Air-to-Surface Missile Exercises (explosive and non-explosive):

(i) Aircraft will visually survey the target area for marine mammals. Visual inspection of the target area will be made by flying at 1,500 (457 m) feet or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas.

(ii) Explosive ordnance shall not be targeted to impact within 1,800 yds (1646 m) of sighted marine mammals.

(14) Aircraft Training Activities Involving Non-Explosive Devices:

An exclusion zone of 200 yds around the target location, therefore, shall be clear of marine mammals. Pre- and post-surveillance and reporting requirements outlined for underwater detonations shall be implemented during Mining Training Activities.

(15) Extended Echo Ranging/Improved Extended Echo Ranging and Advanced Extended Echo-ranging (EER/IEER/AEER)—The following mitigation measures shall be used with the employment of IEER/AEER sonobuoys:

(i) Crews shall conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search shall be conducted at an altitude below 500 yd (457 m) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct coordinated area clearances.

(ii) For IEER (AN/SSQ-110A), crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute

observation period may include pattern deployment time.

(iii) For any part of the intended sonobuoy pattern where a post (source/receiver sonobuoy pair) will be deployed within 1,000 yd (914 m) of observed marine mammal activity, the Navy shall deploy the receiver ONLY (i.e., not the source) and monitor while conducting a visual search. When marine mammals are no longer detected within 1,000 yd (914 m) of the intended post position, the source sonobuoy (AN/SSQ-110A/SSQ-125) will be co-located with the receiver.

(iv) When operationally feasible, Navy crews shall conduct continuous visual and aural monitoring of marine mammal activity. This shall include monitoring of own-aircraft sensors from the time of the first sensor placement until the aircraft have left the area and are out of RF range of these sensors.

(v) *Aural Detection.* If the presence of marine mammals is detected aurally, then that shall cue the Navy aircrew to increase the diligence of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.

(vi) *Visual Detection.* If marine mammals are visually detected within 1,000 yd (914 m) of the explosive source sonobuoy (AN/SSQ-110A/SSQ-125) intended for use, then that payload shall not be activated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 1,000 yd (914 m) safety buffer. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 1,000 yd (914 m) safety buffer.

(vii) For IEER (AN/SSQ-110A), aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the "Payload 1 Release" command followed by the "Payload 2 Release" command. Aircrews shall refrain from using the "Scuttle" command when two payloads remain at a given post. Aircrews shall ensure that a 1,000 yd (914 m) safety buffer, visually clear of marine mammals, is maintained

around each post as is done during active search operations.

(viii) Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, and in-flight emergencies. In these cases, the sonobuoy will self-scuttle using the secondary or tertiary method.

(ix) The Navy shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ-110A) that cannot be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.

(x) Marine mammal monitoring shall continue until out of own-aircraft sensor range.

(16) The Navy shall implement the "Stranding Response Plan for Major Navy Training Exercises in the MIRC" (available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>), which is incorporated herein by reference, including the following measures:

(i) *Shutdown Procedures.* When an Uncommon Stranding Event (USE—defined in §216.271) occurs during a Major Training Exercise (MTE) (as defined in the Stranding Plan, meaning including Multi-strike group exercises, Joint Expeditionary exercises, and Marine Air Ground Task Force exercises in the MIRC), the Navy shall implement the procedures described in this section.

(A) The Navy shall implement a Shutdown (as defined in the Stranding Response Plan for MIRC) when advised by a NMFS Office of Protected Resources Headquarters Senior Official designated in the MIRC Stranding Communication Protocol that a USE (as defined in the Stranding Response Plan for MIRC) involving live animals has been identified and that at least one live animal is located in the water. NMFS and Navy shall communicate, as needed, regarding the identification of the USE and the potential need to implement shutdown procedures.

(B) Any shutdown in a given area shall remain in effect in that area until NMFS advises the Navy that the subject(s) of the USE at that area die or are euthanized, or that all live animals

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involved in the USE at that area have left the area (either of their own volition or herded).

(C) If the Navy finds an injured or dead marine mammal floating at sea during an MTE, the Navy shall notify NMFS immediately or as soon as operational security considerations allow. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) including carcass condition if the animal(s) is/are dead, location, time of first discovery, observed behaviors (if alive), and photo or video of the animals (if available). Based on the information provided, NMFS shall determine if, and advise the Navy whether, a modified shutdown is appropriate on a case-by-case basis.

(D) In the event, following a USE, that: (a) Qualified individuals are attempting to herd animals back out to the open ocean and animals are not willing to leave, or (b) animals are seen repeatedly heading for the open ocean but turning back to shore, NMFS and the Navy shall coordinate (including an investigation of other potential anthropogenic stressors in the area) to determine if the proximity of MFAS/HFAS activities or explosive detonations, though farther than 14 nm from the distressed animal(s), is likely decreasing the likelihood that the animals return to the open water. If so, NMFS and the Navy shall further coordinate to determine what measures are necessary to further minimize that likelihood and implement those measures as appropriate.

(ii) Within 72 hours of NMFS notifying the Navy of the presence of a USE, the Navy shall provide available information to NMFS (per the MIRC Communication Protocol) regarding the location, number and types of acoustic/explosive sources, direction and speed of units using MFAS/HFAS, and marine mammal sightings information associated with training activities occurring within 80 nm (148 km) and 72 hours prior to the USE event. Information not initially available regarding the 80 nm (148 km), 72 hours, period prior to the event shall be provided as soon as it becomes available. The Navy shall provide NMFS investigative teams with additional relevant

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unclassified information as requested, if available.

(b) [Reserved]

### § 218.105 Requirements for monitoring and reporting.

(a) *General Notification of Injured or Dead Marine Mammals.* Navy personnel shall ensure that NMFS is notified immediately ((see Communication Plan) or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy will provide NMFS with the name of species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video of the animal(s) (if available). In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or during or shortly after, MFAS, HFAS, or underwater explosive detonations, the Navy will report the same information as listed above as soon as operationally feasible and clearance procedures allow.

(b) *General Notification of Ship Strike.* In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

(1) Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead, or whether its status is unknown.

(2) Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (ex., dead, injured but alive, injured and moving, unknown, etc.), vessel class/type and operational status.

(3) Report to NMFS the vessel length, speed, and heading as soon as feasible.

(4) Provide NMFS a photo or video of the animal(s), if equipment is available.

(c) The Navy must conduct all monitoring and/or research required under the Letter of Authorization, including

abiding by the annual MIRC Monitoring Plan. (<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>)

(d) *Report on Monitoring required in paragraph (c) of this section.* The Navy shall submit a report annually describing the implementation and results of the monitoring required in paragraph (c) of this section. Required submission date will be identified each year in the LOA. Navy will standardize data collection methods across ranges to allow for comparison in different geographic locations.

(e) *Sonar Exercise Notification.* The Navy shall submit to the NMFS Office of Protected Resources (specific contact information to be provided in LOA) either an electronic (preferably) or verbal report within fifteen calendar days after the completion of any Major Training Exercise for Reporting (MTER) indicating:

- (1) Location of the exercise;
- (2) Beginning and end dates of the exercise; and
- (3) Type of exercise.

(f) *Annual MIRC Report.* The Navy will submit an Annual Exercise MIRC Report every year. This report shall contain the subsections and information indicated below.

(1) MFAS/HFAS Major Training Exercises—This section shall contain the following information for the following Coordinated and Strike Group exercises, which for simplicity will be referred to as MTERs: Joint Multi-strike Group Exercises; Joint Expeditionary Exercises; and Marine Air Ground Task Force MIRC:

(i) Exercise Information (for each MTER):

- (A) Exercise designator;
- (B) Date that exercise began and ended;
- (C) Location;
- (D) Number and types of active sources used in the exercise;
- (E) Number and types of passive acoustic sources used in exercise;
- (F) Number and types of vessels, aircraft, etc., participating in exercise;
- (G) Total hours of observation by watchstanders;
- (H) Total hours of all active sonar source operation;
- (I) Total hours of each active sonar source (along with explanation of how

hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.)); and

(J) Wave height (high, low, and average during exercise).

(ii) Individual marine mammal sighting info (for each sighting in each MTER):

- (A) Location of sighting;
- (B) Species (if not possible—indication of whale/dolphin/pinniped);
- (C) Number of individuals;
- (D) Calves observed (y/n);
- (E) Initial Detection Sensor;
- (F) Indication of specific type of platform observation made from (including, for example, what type of surface vessel, *i.e.*, FFG, DDG, or CG);
- (G) Length of time observers maintained visual contact with marine mammal(s);
- (H) Wave height (in feet);
- (I) Visibility;
- (J) Sonar source in use (y/n);
- (K) Indication of whether animal is <200 yd, 200–500 yd, 500–1,000 yd, 1,000–2,000 yd, or >2,000 yd from sonar source in paragraph (f)(1)(i)(J) of this section;
- (L) *Mitigation Implementation.* Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was;

(M) If source in use in paragraph (f)(1)(i)(J) is hullmounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel); and

(N) *Observed behavior.* Watchstanders shall describe, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.).

(iii) An evaluation (based on data gathered during all of the MTERs) of the effectiveness of mitigation measures designed to avoid exposing marine mammals to MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) *ASW Summary.* This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs):

(i) *Total Hours*. Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.));

(ii) *Cumulative Impacts*. To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting non-major training (*i.e.*, ULT) utilizing hull-mounted sonar. The report shall present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across MIRC. The Navy shall include (in the MIRC annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

(3) *Sinking Exercises (SINKEXs)*. This section shall include the following information for each SINKEX completed that year:

(i) Exercise info:

(A) Location;

(B) Date and time exercise began and ended;

(C) Total hours of observation by watchstanders before, during, and after exercise;

(D) Total number and types of rounds expended/explosives detonated;

(E) Number and types of passive acoustic sources used in exercise;

(F) Total hours of passive acoustic search time;

(G) Number and types of vessels, aircraft, etc., participating in exercise;

(H) Wave height in feet (high, low and average during exercise); and

(I) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(ii) Individual marine mammal observation during SINKEX (by Navy look-outs) information:

(A) Location of sighting;

(B) Species (if not possible—indication of whale/dolphin/pinniped);

(C) Number of individuals;

(D) Calves observed (y/n);

(E) Initial detection sensor;

(F) Length of time observers maintained visual contact with marine mammal;

(G) Wave height;

(H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance:

(1) The modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (TBD m for SINKEX in MIRC);

(2) The required exclusion zone (1 nm for SINKEX in MIRC);

(3) The required observation distance (if different than the exclusion zone (2 nm for SINKEX in MIRC); and

(4) Greater than the required observed distance. For example, in this case, the observer shall indicate if <TBD m, from 426 m–1 nm, from 1 nm–2 nm, and >2 nm.

(K) Observed behavior—Watchstanders will describe, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction.

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(4) Improved Extended Echo-Ranging System (IEER)/Advanced Extended Echo-Ranging (AEER) Summary:

(i) Total number of IEER and AEER events conducted in MIRC;

(ii) Total expended/detonated rounds (buoys); and

(iii) Total number of self-scuttled IEER rounds.

(5) *Explosives Summary*. The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy shall provide the information described below

for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(i) Total annual number of each type of explosive exercise (of those identified as part of the "activity" in this Subpart) conducted in MIRC; and

(ii) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(g) *MIRC 5-year Comprehensive Report.* The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual MIRC Exercise Reports and MIRC Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (November 2014), covering activities that have occurred through July 15, 2014.

(h) *Comprehensive National ASW Report.* By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Mariana Islands Range Complex, and the Gulf of Alaska.

(i) The Navy shall comply with the 2009 Integrated Comprehensive Monitoring Program (ICMP) Plan and continue to improve the program in consultation with NMFS. Changes and improvements to the program made during 2010 (as prescribed in the 2009 ICMP and deemed appropriate by the Navy and NMFS) will be described in an updated 2010 ICMP and submitted to NMFS by October 31, 2010, for review. An updated 2010 ICMP will be finalized by December 31, 2010.

#### **§ 218.106 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103)

conducting the activity identified in § 218.100(c) (*i.e.*, the Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.107 or a renewal under § 218.108.

#### **§ 218.107 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in § 218.108 and the modification conditions in § 218.109.

(b) Each Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

#### **§ 218.108 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.107 for the activity identified in § 218.100(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.106 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Receipt of the monitoring reports and notifications within the timeframes indicated in the previous LOA; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under § 218.104 and the Letter of Authorization issued under § 216.106 of this chapter and

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§218.107, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.106 and 218.208 indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) *Adaptive Management.* NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from the MIRC Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011.

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the Integrated Comprehensive Monitoring Plan).

(4) Results from specific stranding investigations (either from the MIRC Study Area or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research.

(7) Any information which reveals that marine mammals may have been taken in a manner, extent or number

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not anticipated by these regulations or subsequent Letters of Authorization.

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

### §218.109 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§216.106 and 218.107 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.108 without modification (except for the period of validity) is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.100(b), a Letter of Authorization issued pursuant to §§216.106 and 218.107 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### Subpart M—Taking and Importing Marine Mammals; U.S. Navy's Northwest Training Range Complex (NWTRC)

SOURCE: 75 FR 69319, Nov. 10, 2010, unless otherwise noted.

EFFECTIVE DATE NOTE: At 75 FR 69319, Nov. 10, 2010, subpart M was added, effective Nov. 9, 2010 through Nov. 9, 2015.

### §218.110 Specified activity and specified geographical area.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Offshore area of the Northwest Training Range Complex (NWTRC) (as depicted in Figure ES-1 in the Navy's Draft Environmental Impact Statement for NWTRC), which is bounded by 48°30' N. lat.; 130°00' W. long.; 40°00' N. lat.; and on the east by 124°00' W. long or by the shoreline where the shoreline extends west of 124°00' W. long (excluding the Strait of Juan de Fuca (east of 124°40' W. long), which is not included in the Offshore area).

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources, or similar sources, for Navy training, maintenance, or research, development, testing, and evaluation (RDT&E) (estimated amounts below):

(i) AN/SQS-53 (hull-mounted active sonar)—up to 215 hours over the course of 5 years (an average of 43 hours per year);

(ii) AN/SQS-56 (hull-mounted active sonar)—up to 325 hours over the course of 5 years (an average of 65 hours per year);

(iii) SSQ-62 (Directional Command Activated Sonobuoy System (DICASS) sonobuoys)—up to 4430 sonobuoys over the course of 5 years (an average of 886 sonobuoys per year)

(iv) MK-48 (heavyweight torpedoes)—up to 10 torpedoes over the course of 5 years (an average of 2 torpedoes per year);

(v) AN/BQS-15 (mine detection and submarine navigational sonar)—up to 210 hours over the course of 5 years (an average of 42 hours per year);

(vi) AN/SSQ-125 (AEER)—up to 745 buoys deployed over the course of 5 years (total combined with the AN/SSQ-110A (IEER)) (an average of 149 per year);

(vii) Range Pingers—up to 900 hours over the course of 5 years (an average of 180 hours per year); and

(viii) PUTR Uplink—up to 750 hours over the course of 5 years (an average of 150 hours per year).

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section, or similar explosives, conducted as part of the training exercises indicated in paragraph (c)(2)(ii) of this section:

(i) Underwater Explosives:

(A) 5" Naval Gunfire (9.5 lbs);

(B) 76 mm rounds (1.6 lbs);

(C) Maverick (78.5 lbs);

(D) Harpoon (448 lbs);

(E) MK-82 (238 lbs);

(F) MK-48 (851 lbs);

(G) Demolition Charges (2.5 lbs);

(H) AN/SSQ-110A (IEER explosive sonobuoy—5 lbs);

(I) HARM;

(J) Hellfire;

(K) SLAM; and

(L) GBU 10, 12, and 16.

(ii) Training Events:

(A) Surface-to-surface Gunnery Exercises (S-S GUNEX)—up to 1700 exercises over the course of 5 years (an average of 340 per year).

(B) Bombing Exercises (BOMBEX)—up to 150 exercises over the course of 5 years (an average of 30 per year).

(C) Sinking Exercises (SINKEX)—up to 10 exercises over the course of 5 years (an average of 2 per year).

(D) Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—up to 60 exercises (total combined with the AN/SSQ-125A (AEER)) over the course of 5 years (an average of 12 per year).

(3) The taking of marine mammals may also be authorized in an LOA for the activities and sources listed in §218.110(c)(1) should the amounts (*i.e.*, hours, dips, number of exercises) vary from those estimated in §218.110(c)(2), provided that the variation does not result in exceeding the amount of take indicated in §218.112(c).

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

#### §218.111 Effective dates.

Amended regulations are effective February 1, 2012, through November 9, 2015.

[77 FR 4924, Feb. 1, 2012]

#### §218.112 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 218.117



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of this chapter, the Holder of the Letter of Authorization (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in §218.110(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) [Reserved]

(c) The incidental take of marine mammals under the activities identified in §218.110(c) is limited to the species listed in paragraphs (c)(4) and (5) of this section by the indicated method of take and the indicated number of times (estimated based on the authorized amounts of sound source operation), but with the following allowances for annual variation in sonar activities:

(1) In any given year, annual take, by harassment, of any species of marine mammal may not exceed the amount identified in paragraph (c)(4) and (5) of this section, for that species by more than 25 percent (a post-calculation/estimation of which must be provided in the annual LOA application);

(2) In any given year, annual take by harassment of all marine mammal species combined may not exceed the estimated total of all species combined, indicated in paragraphs (c)(4) and (5), by more than 10 percent; and

(3) Over the course of the effective period of this subpart, total take, by harassment, of any species may not exceed the 5-year amounts indicated in paragraphs (c)(4) and (5) by more than 10 percent. A running calculation/estimation of takes of each species over the course of the years covered by the rule must be maintained.

(4) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—75 (an average of 15 annually);

(B) Fin whale (*Balaenoptera physalus*)—720 (an average of 144 annually);

(C) Blue whale (*Balaenoptera musculus*)—95 (an average of 19 annually);

(D) Sei whale (*Balaenoptera borealis*)—5 (an average of 1 annually);

(E) Minke whale (*Balaenoptera acutorostrata*)—45 (an average of 9 annually); and

(F) Gray whale (*Eschrichtius robustus*)—20 (an average of 4 annually).

(ii) Odontocetes:

(A) Sperm whales (*Physeter macrocephalus*)—635 (an average of 127 annually);

(B) Killer whale (*Orcinus orca*)—70 (an average of 14 annually);

(C) Pygmy or dwarf sperm whales (*Kogia breviceps* or *Kogia sima*)—20 (an average of 4 annually);

(D) Mesoplodont beaked whales—75 (an average of 15 annually);

(E) Cuvier’s beaked whales (*Ziphius cavirostris*)—70 (an average of 14 annually);

(F) Baird’s beaked whales (*Berardius bairdii*)—65 (an average of 13 annually);

(G) Short-finned pilot whale (*Globicephala macrorhynchus*)—10 (an average of 2 annually);

(H) Striped dolphin (*Stenella coeruleoalba*)—200 (an average of 40 annually);

(I) Short-beaked common dolphin (*Globicephala macrorhynchus*)—6280 (an average of 1256 annually);

(J) Risso’s dolphin (*Grampus griseus*)—500 (an average of 100 annually);

(K) Northern right whale dolphin (*Lissodelphis borealis*)—3705 (an average of 741 annually);

(L) Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)—2855 (an average of 571 annually);

(M) Dall’s porpoise (*Phocoenoides dalli*)—23760 (an average of 4752 annually); and

(N) Harbor Porpoise (*Phocoena phocoena*)—596370 (an average of 119274 annually).

(ii) Pinnipeds:

(A) Northern elephant seal (*Mirounga angustirostris*)—1890 (an average of 378 annually);

(B) Pacific harbor seal (*Phoca vitulina*)—2930 (an average of 586 annually);

(C) California sea lion (*Zalophus californianus*)—1430 (an average of 286 annually);

(D) Northern fur seal (*Callorhinus ursinus*)—6825 (an average of 1365 annually); and

(E) Steller sea lion (*Eumetopias jubatus*)—600 (an average of 120 annually).

(5) Level A Harassment:

(i) Fin whale—5 (an average of 1 annually);

(ii) Sperm whale—5 (an average of 1 annually);

(iii) Dall's Porpoise—15 (an average of 3 annually);

(iv) Harbor Porpoise—5 (an average of 1 annually);

(v) Northern right whale dolphin—5 (an average of 1 annually);

(vi) Short-beaked common dolphin—10 (an average of 2 annually);

(vii) Northern elephant seal—10 (an average of 2 annually);

(viii) Pacific harbor seal—5 (an average of 1 annually); and

(ix) Northern fur seal—5 (an average of 1 annually).

EDITORIAL NOTE: At 75 FR 69319, Nov. 10, 2010, subpart M was added; at that time, §218.112 was added with two paragraphs (a)(4)(ii).

#### §218.113 Prohibitions.

No person in connection with the activities described in §218.110 may:

(a) Take any marine mammal not specified in §218.112(c);

(b) Take any marine mammal specified in §218.112(c) other than by incidental take as specified in §§218.112(c)(1) and (c)(2);

(c) Take a marine mammal specified in §218.112(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §§216.106 and 218.117 of this chapter.

#### §218.114 Mitigation.

(a) When conducting training and utilizing the sound sources or explosives identified in §218.110(c), the mitigation measures contained in the Letter of Authorization issued under §§216.106 and 218.117 of this chapter must be implemented. These mitigation measures include, but are not limited to:

(1) Navy's General Maritime Measures for All Training at Sea:

(i) Personnel Training (for all Training Types):

(A) All commanding officers (COs), executive officers (XOs), lookouts, Officers of the Deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-submarine Warfare (ASW)/Mine Warfare (MIW) helicopter crews shall complete the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge lookouts shall complete both parts one and two of the MSAT; part two is optional for other personnel.

(B) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968-D) available at <https://portal.navfac.navy.mil/go/navytraining-env-docs>.

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced lookout. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as lookouts can be counted among required lookouts as long as supervisors monitor their progress and performance.

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

(ii) Operating Procedures and Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species protective measures.

(B) COs shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

(D) On surface vessels equipped with a multi-function active sensor, pedestal mounted “Big Eye” (20x110) binoculars shall be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(E) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook. (NAVEDTRA 12968–D).

(G) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a “safe speed” so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(H) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and take reasonable and practicable actions to avoid collisions and activities that might result in close interaction of naval assets and marine mammals. Actions may include changing speed and/or direction and are dictated by environmental and other conditions (e.g., safety, weather).

(I) Naval vessels shall maneuver to keep at least 1,500 ft (500 yds) away from any observed whale in the vessel’s path and avoid approaching whales head-on. These requirements do not apply if a vessel’s safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited

to, situations when vessels are engaged in dredging, submerged activities, launching and recovering aircraft or landing craft, minesweeping activities, replenishment while underway and towing activities that severely restrict a vessel’s ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale. Given rapid swimming speeds and maneuverability of many dolphin species, naval vessels would maintain normal course and speed on sighting dolphins unless some condition indicated a need for the vessel to maneuver.

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine mammals as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate when it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a major training exercise.

(2) Navy’s Measures for MFAS Operations:

(i) Personnel Training (for MFAS Operations):

(A) All lookouts onboard platforms involved in ASW training events shall review the NMFS-approved Marine Species Awareness Training material prior to use of mid-frequency active sonar.

(B) All COs, XOs, and officers standing watch on the bridge shall have reviewed the Marine Species Awareness Training material prior to a training event employing the use of mid-frequency active sonar.

(C) Navy lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval

Educational Training [NAVEDTRA], 12968-D).

(D) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). This does not forbid personnel being trained as lookouts from being counted as those listed in previous measures so long as supervisors monitor their progress and performance.

(E) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of mitigation measures if marine species are spotted.

(ii) Lookout and Watchstander Responsibilities:

(A) On the bridge of surface ships, there shall always be at least three people on watch whose duties include observing the water surface around the vessel.

(B) All surface ships participating in ASW training events shall, in addition to the three personnel on watch noted previously, have at all times during the exercise at least two additional personnel on watch as marine mammal lookouts.

(C) Personnel on lookout and officers on watch on the bridge shall have at least one set of binoculars available for each person to aid in the detection of marine mammals.

(D) On surface vessels equipped with mid-frequency active sonar, pedestal mounted "Big Eye" (20×110) binoculars shall be present and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(E) Personnel on lookout shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(F) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook.

(G) Personnel on lookout shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Officer of the Deck, since any object or disturbance (*e.g.*, trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine species that may need to be avoided as warranted.

(iii) Operating Procedures (for MFAS Operations):

(A) Navy will distribute final mitigation measures contained in the LOA and the Incidental take statement of NMFS' biological opinion to the Fleet.

(B) COs shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

(D) During mid-frequency active sonar operations, personnel shall utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

(E) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(F) Aircraft with deployed sonobuoys shall use only the passive capability of sonobuoys when marine mammals are detected within 200 yds (183 m) of the sonobuoy.

(G) Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(H) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 6 dB below normal operating levels if any detected marine mammals are within 1,000 yards (914 m) of the sonar dome (the bow).

(1) Ships and submarines shall continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1,000-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(2) When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission levels are limited to at least 10 dB below normal operating levels if any detected marine mammals are within 500 yards (497 m) of the sonar dome (the bow). Ships and submarines shall continue to limit maximum ping levels by this 10-dB factor until the animal has been seen to leave the 500-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(3) When marine mammals are detected by any means (aircraft, shipboard lookout, or acoustically) the Navy shall ensure that sonar transmission ceases if any detected marine mammals are within 200 yards (183 m) of the sonar dome (the bow). Sonar shall not resume until the animal has been seen to leave the 200-yd safety zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1829 m) beyond the location of the last detection.

(4) Special conditions applicable for dolphins and porpoises only: If, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior.

(5) If the need for power-down should arise as detailed in "Safety Zones" above, the Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (*i.e.*, the first power-down will be to 229 dB, regardless of at what level above 235 dB active sonar was being operated).

(I) Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

(J) Active sonar levels (generally)—Navy shall operate active sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

(K) Helicopters shall observe/survey the vicinity of an ASW training event for 10 minutes before the first deployment of active (dipping) sonar in the water.

(L) Helicopters shall not dip their active sonar within 200 yds (183 m) of a marine mammal and shall cease pinging if a marine mammal closes within 200 yds of the sound source (183 m) after pinging has begun.

(M) Submarine sonar operators shall review detection indicators of close- aboard marine mammals prior to the commencement of ASW training events involving active mid-frequency sonar.

(N) Night vision goggles shall be available to all ships and air crews, for use as appropriate.

(3) Navy's Measures for Underwater Detonations:

(i) Surface-to-Surface Gunnery (non-explosive rounds)

(A) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(B) From the intended firing position, trained lookouts shall survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable.

(C) If applicable, target towing vessels shall maintain a lookout. If a marine mammal is sighted in the vicinity of the exercise, the tow vessel shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(D) The exercise shall be conducted only when the buffer zone is visible and

marine mammals are not detected within the target area and the buffer zone.

(ii) Surface-to-Air Gunnery (explosive and non-explosive rounds)

(A) Vessels shall orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals.

(B) Vessels will attempt to recover any parachute deploying aerial targets to the extent practicable (and their parachutes if feasible) to reduce the potential for entanglement of marine mammals.

(C) For exercises using targets towed by a vessel or aircraft, target towing vessel/aircraft shall maintain a lookout. If a marine mammal is sighted in the vicinity of the exercise, the tow aircraft shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(iii) Air-to-Surface At-sea Bombing Exercises (explosive and non-explosive):

(A) If surface vessels are involved, trained lookouts shall survey for floating kelp and marine mammals. Ordnance shall not be targeted to impact within 1,000 yds (914 m) of known or observed floating kelp or marine mammals.

(B) A 1,000 yd (914 m) radius buffer zone shall be established around the intended target.

(C) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited: aircraft must be able to actually see ordnance impact areas. Survey aircraft should employ most effective search tactics and capabilities.

(D) The exercise will be conducted only if marine mammals are not visible within the buffer zone.

(iv) Air-to-Surface Missile Exercises (explosive and non-explosive):

(A) Ordnance shall not be targeted to impact within 1,800 yds (1646 m) of known or observed floating kelp.

(B) Aircraft shall visually survey the target area for marine mammals. Visual inspection of the target area shall

be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yds (1646 m) of sighted marine mammals.

(v) Demolitions, Mine Warfare, and Mine Countermeasures (up to a 2.5-lb charge):

(A) Exclusion Zones—All Mine Warfare and Mine Countermeasures Operations involving the use of explosive charges must include exclusion zones for marine mammals to prevent physical and/or acoustic effects to those species. These exclusion zones shall extend in a 700-yard arc radius around the detonation site.

(B) Pre-Exercise Surveys—For Demolition and Ship Mine Countermeasures Operations, pre-exercise surveys shall be conducted within 30 minutes prior to the commencement of the scheduled explosive event. The survey may be conducted from the surface, by divers, and/or from the air, and personnel shall be alert to the presence of any marine mammal. Should such an animal be present within the survey area, the explosive event shall not be started until the animal voluntarily leaves the area. The Navy will ensure the area is clear of marine mammals for a full 30 minutes prior to initiating the explosive event. Personnel will record any marine mammal observations during the exercise as well as measures taken if species are detected within the exclusion zone.

(C) Post-Exercise Surveys—Surveys within the same radius shall also be conducted within 30 minutes after the completion of the explosive event.

(D) Reporting—If there is evidence that a marine mammal may have been stranded, injured or killed by the action, Navy training activities shall be immediately suspended and the situation immediately reported by the participating unit to the Officer in Charge of the Exercise (OCE), who will follow Navy procedures for reporting the incident to Commander, Pacific Fleet, Commander, Navy Region Northwest, Environmental Director, and the chain-of-command. The situation shall

also be reported to NMFS (see Stranding Plan for details).

(vi) Sink Exercise:

(A) All weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

(B) An exclusion zone with a radius of 1.5 nm shall be established around each target. This 1.5 nm zone includes a buffer of 0.5 nm to account for errors, target drift, and animal movement. In addition to the 1.5 nm exclusion zone, a further safety zone, which extends from the exclusion zone at 1.5 nm out an additional 0.5 nm, shall be surveyed. Together, the zones extend out 2 nm (3.7 km) from the target.

(C) A series of surveillance overflights shall be conducted within the 2-nm zone around the target, prior to and during the exercise, when feasible. Survey protocol shall be as follows:

(1) Overflights within the 2-nm zone around the target shall be conducted in a manner that optimizes the surface area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

(2) All visual surveillance activities shall be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team is required to have completed the Navy's marine mammal training program for lookouts.

(3) In addition to the overflights, the 2-nm zone around the target shall be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring would be maintained throughout the exercise. Potential assets include sonobuoys, which can be utilized to detect any vocalizing marine mammals (particularly sperm whales) in the vicinity of the exercise. The sonobuoys shall be re-seeded as necessary throughout the exercise. Additionally, if submarines are present, passive sonar onboard shall be utilized

to detect any vocalizing marine mammals in the area. The OCE would be informed of any aural detection of marine mammals and would include this information in the determination of when it is safe to commence the exercise.

(4) On each day of the exercise, aerial surveillance of the 2-nm zone around the target shall commence 2 hours prior to the first firing.

(5) The results of all visual, aerial, and acoustic searches shall be reported immediately to the OCE. No weapons launches or firing may commence until the OCE declares the 2-nm zone around the target free of marine mammals.

(6) If a marine mammal observed within the 2-nm zone around the target is diving, firing would be delayed until the animal is re-sighted outside the 2-nm zone around the target, or 30 minutes have elapsed. After 30 minutes, if the animal has not been re-sighted it would be assumed to have left the exclusion zone. The OCE would determine if the identified marine mammal is in danger of being adversely affected by commencement of the exercise.

(7) During breaks in the exercise of 30 minutes or more, the 2-nm zone around the target shall again be surveyed for any marine mammal. If marine mammals are sighted within 2-nm zone around the target, the OCE shall be notified, and the procedure described in (vi)(c)(1)–(6) would be followed.

(8) Upon sinking of the vessel, a final surveillance of the 2-nm zone around the target shall be monitored for 2 hours, or until sunset, to verify that no marine mammals were injured.

(D) Aerial surveillance shall be conducted using helicopters or other aircraft based on necessity and availability.

(E) Where practicable, the Navy shall conduct the exercise in sea states that are ideal for marine mammal sighting, *i.e.*, Beaufort Sea State 3 or less. In the event of a Beaufort Sea State 4 or above, survey efforts shall be increased within the 2-nm zone around the target. This shall be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

(F) The sink exercise shall not be conducted unless the 2-nm zone around

the target could be adequately monitored visually.

(G) In the event that any marine mammals are observed to be harmed in the area, NMFS shall be notified as soon as feasible following the stranding communication protocol. A detailed description of the animal shall be taken, the location noted, and if possible, photos taken. This information shall be provided to NMFS as soon as practicable via the Navy's regional environmental coordinator for purposes of identification.

(H) An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event shall be submitted to NMFS.

(vii) Extended Echo Ranging/Improved Extended Echo Ranging (EER/IEER):

(A) Crews shall conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search shall be conducted at an altitude below 457 m (500 yd) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct area clearances utilizing more than one aircraft.

(B) For IEER (AN/SSQ-110A), crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute observation period may include pattern deployment time.

(C) For any part of the intended sonobuoy pattern where a post (source/receiver sonobuoy pair) will be deployed within 914 m (1,000 yd) of observed marine mammal activity, the Navy shall deploy the receiver ONLY (*i.e.*, not the source) and monitor while conducting a visual search. When marine mammals are no longer detected within 914 m (1,000 yd) of the intended post position, the source sonobuoy (AN/SSQ-110A/SSQ-125) will be co-located with the receiver.

(D) When operationally feasible, Navy crews shall conduct continuous visual and aural monitoring of marine mammal activity. This shall include monitoring of aircraft sensors from the

time of the first sensor placement until the aircraft have left the area and are out of RF range of these sensors.

(E) Aural Detection—If the presence of marine mammals is detected aurally, then that shall cue the Navy aircrew to increase the vigilance of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.

(F) Visual Detection—If marine mammals are visually detected within 914 m (1,000 yd) of the explosive source sonobuoy (AN/SSQ-110A) intended for use, then that payload shall not be detonated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 914 m (1,000 yd) safety buffer. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 914 m (1,000 yd) safety buffer.

(G) For IEER (AN/SSQ-110A), aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the "Payload 1 Release" command followed by the "Payload 2 Release" command. Aircrews shall refrain from using the "Scuttle" command when two payloads remain at a given post. Aircrews will ensure that a 914 m (1,000 yd) safety buffer, visually clear of marine mammals, is maintained around each post as is done during active search operations.

(H) Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, or in-flight emergencies. In these cases, the sonobuoy will self-scuttle using the secondary or tertiary method.

(I) The Navy shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ-110A) that cannot be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.



## §218.115

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(J) Mammal monitoring shall continue until out of own-aircraft sensor range.

(b) [Reserved]

### §218.115 Requirements for monitoring and reporting.

(a) *General Notification of Injured or Dead Marine Mammals*—Navy personnel shall ensure that NMFS is notified immediately ((see Communication Plan) or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy will provide NMFS with the name of species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or during or shortly after, MFAS, HFAS, or underwater explosive detonations, the Navy will report the same information as listed above as soon as operationally feasible and clearance procedures allow.

(b) *General Notification of Ship Strike*—In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

(1) Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead (or unknown).

(2) Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (ex., dead, injured but alive, injured and moving, unknown, etc.), vessel class/type and operational status.

(3) Report to NMFS the vessel length, speed, and heading as soon as feasible.

(4) Provide NMFS a photo or video, if equipment is available.

(c) *Event Communication Plan*—The Navy shall develop a communication plan that will include all of the communication protocols (phone trees, etc.) and associated contact information required for NMFS and the Navy

to carry out the necessary expeditious communication required in the event of a stranding or ship strike, including as described in the proposed notification measures above.

(d) The Navy must conduct all monitoring and/or research required under the Letter of Authorization, including abiding by the annual NWTRC Monitoring Plan. (<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>)

(e) The Navy shall comply with the 2009 Integrated Comprehensive Monitoring Program (ICMP) Plan and continue to improve the program in consultation with NMFS. Changes and improvements to the program made during 2010 (as prescribed in the 2009 ICMP and otherwise deemed appropriate by the Navy and NMFS) will be described in an updated 2010 ICMP and submitted to NMFS by October 31, 2010 for review. An updated 2010 ICMP will be finalized by December 31, 2010.

(f) *Report on Monitoring required in paragraph (e) of this section*—The Navy shall submit a report annually describing the implementation and results of the monitoring required in paragraph (d) of this section. The required submission date will be identified each year in the LOA. The Navy will standardize data collection methods across ranges to allow for comparison in different geographic locations.

(g) *Annual NWTRC Report*—The Navy will submit an Annual NWTRC Report every year. The required submission date will be identified each year in the LOA. This report shall contain the subsections and information indicated below.

(1) *ASW Summary*—This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs and MIW):

(i) *Total Hours*—Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, etc.))

(ii) *Cumulative Impacts*—To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting non-major training (i.e., ULT) utilizing hull-mounted sonar. The report shall

present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across NWTRC. The Navy shall include (in the NWTRC annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

(2) [Reserved]

(h) *Sinking Exercises (SINKEXs)*—This section shall include the following information for each SINKEX completed that year:

(1) Exercise Info:

(i) Location;

(ii) Date and time exercise began and ended;

(iii) Total hours of observation by watchstanders before, during, and after exercise;

(iv) Total number and types of rounds expended/explosives detonated;

(v) Number and types of passive acoustic sources used in exercise;

(vi) Total hours of passive acoustic search time;

(vii) Number and types of vessels, aircraft, etc., participating in exercise;

(viii) Wave height in feet (high, low and average during exercise); and

(ix) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(2) Individual marine mammal observation during SINKEX (by Navy look-outs) information:

(i) Location of sighting;

(ii) Species (if not possible—indication of whale/dolphin/pinniped);

(iii) Number of individuals;

(iv) Calves observed (y/n);

(v) Initial detection sensor;

(vi) Length of time observers maintained visual contact with marine mammal;

(vii) Wave height;

(viii) Visibility;

(ix) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(x) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance:

(A) the modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (662 m for SINKEX in NWTRC);

(B) the required exclusion zone (1 nm for SINKEX in NWTRC);

(C) the required observation distance (if different than the exclusion zone (2 nm for SINKEX in NWTRC)); and

(D) greater than the required observed distance. For example, in this case, the observer would indicate if <662 m, from 738 m–1 nm, from 1 nm–2 nm, and >2 nm.

(xi) Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction.

(xii) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(xiii) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(i) Improved Extended Echo-Ranging System (IEER) Summary

(1) Total number of IEER events conducted in NWTRC;

(2) Total expended/detonated rounds (buoys); and

(3) Total number of self-scuttled IEER rounds.

(j) *Explosives Summary*—The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(k) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in NWTRC; and

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

## §218.116

(1) *NWTRC 5-Yr Comprehensive Report*—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual NWTRC Exercise Reports and NWTRC Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (July 2014), covering activities that have occurred through February 1, 2014.

(m) *Comprehensive National ASW Report*—By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Marianas Islands Range Complex, and the Gulf of Alaska.

(n) The Navy shall respond to NMFS comments and requests for additional information or clarification on the NWTRC Comprehensive Report, the Comprehensive National ASW report, the Annual NWTRC Exercise Report, or the Annual NWTRC Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(o) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

EDITORIAL NOTE: At 75 FR 69319, Nov. 10, 2010, subpart M was added; at that time,

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§218.115 was added without a paragraph (k)(1) designation.

### §218.116 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by §216.103) conducting the activity identified in §218.110(c) (*i.e.*, the Navy) must apply for and obtain either an initial Letter of Authorization in accordance with §218.117 or a renewal under §218.118.

### §218.117 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in §218.118 and the modification conditions in §218.119.

(b) Each Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

### §218.118 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under §§216.106 of this chapter and 218.117 for the activity identified in §218.110(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under §218.116 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Receipt of the monitoring reports and notifications within the timeframes indicated in the previous LOA; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §218.114 and the Letter of Authorization issued under §216.106 of this chapter and §218.117, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.106 and 216.118 indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from the NWTRC Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011.

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the Integrated Comprehensive Monitoring Plan).

(4) Results from specific stranding investigations (either from the NWTRC Study Area or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy or otherwise).

(7) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[75 FR 45547, Aug. 3, 2010, as amended at 77 FR 4924, Feb. 1, 2012]

#### **§218.119 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§216.106 and 218.117 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.118, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.112(c), a Letter of Authorization issued pursuant to §§216.106 and 218.117 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

#### **Subpart N—Taking and Importing Marine Mammals; Gulf of Alaska Temporary Maritime Activities Area (GoA TMAA)**

SOURCE: 76 FR 25505, May 4, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 25505, May 4, 2011, subpart N was added, effective May 4, 2011 through May 4, 2016.

## § 218.120

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### § 218.120 Specified activity and geographical area.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Gulf of Alaska Temporary Maritime Activities Area (GoA TMAA) (as depicted in Figure 1–1 in the Navy's application for GoA TMAA), which is bounded by a hexagon with the following six corners: 57°30' N. lat., 141°30' W. long.; 59°36' N. lat., 148°10' W. long.; 58°57' N. lat., 150°04' W. long.; 58°20' N. lat., 151°00' W. long.; 57°16' N. lat., 151°00' W. long.; and 55°30' N. lat., 142°00' W. long.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) sources, high-frequency active sonar (HFAS) sources, or similar sources for Navy training activities (estimated amounts below):

(i) AN/SQS-53 (hull-mounted active sonar)—up to 2,890 hours over the course of 5 years (an average of 578 hours per year);

(ii) AN/SQS-56 (hull-mounted active sonar)—up to 260 hours over the course of 5 years (an average of 52 hours per year);

(iii) AN/SSQ-62 (Directional Command Activated Sonobuoy System (DICASS) sonobuoys)—up to 1,330 sonobuoys over the course of 5 years (an average of 266 sonobuoys per year);

(iv) AN/AQS-22 (helicopter dipping sonar)—up to 960 “dips” over the course of 5 years (an average of 192 “dips” per year);

(v) AN/BQQ-10 (submarine hull-mounted sonar)—up to 240 hours over the course of 5 years (an average of 48 hours per year);

(vi) MK-48 (torpedo)—up to 10 torpedoes over the course of 5 years (a maximum of 2 torpedoes per year);

(vii) AN/SSQ-110A (IEER)—up to 400 buoys deployed over the course of 5 years (an average of 80 per year maximum combined use of AN/SSQ-110A or AN/SSQ-125);

(viii) AN/SSQ-125 (MAC)—up to 400 buoys deployed over the course of 5 years (an average of 80 per year maximum combined use of AN/SSQ-110A or AN/SSQ-125);

(ix) Range Pingers—up to 400 hours over the course of 5 years (an average of 80 hours per year);

(x) SUS MK-84—up to 120 devices over the course of 5 years (an average of 24 per year);

(xi) PUTR Transponder—up to 400 hours over the course of 5 years (an average of 80 hours per year); and

(xii) MK-39 EMATT Targets—up to 60 devices over the course of 5 years (an average of 12 per year).

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section, or similar explosives, conducted as part of the training exercises indicated in paragraph (c)(2)(ii) of this section:

(i) Underwater Explosives (Net Explosive Weight (NEW)):

(A) 5" Naval Gunfire (9.5 lbs NEW);

(B) 76 mm rounds (1.6 lbs NEW);

(C) Maverick (78.5 lbs NEW);

(D) MK-82 (238 lbs NEW);

(E) MK-83 (238 lbs NEW);

(F) MK-83 (574 lbs NEW);

(G) MK-84 (945 lbs NEW);

(H) MK-48 (851 lbs NEW);

(I) AN/SSQ-110A (IEER explosive sonobuoy—5 lbs NEW);

(ii) Training Events:

(A) Gunnery Exercises (S-S GUNEX)—up to 60 exercises over the course of 5 years (an average of 12 per year);

(B) Bombing Exercises (BOMBEX)—up to 180 exercises over the course of 5 years (an average of 36 per year);

(C) Sinking Exercises (SINKEX)—up to 10 exercises over the course of 5 years (a maximum of 2 per year);

(D) Extended Echo Ranging and Improved Extended Echo Ranging (EER/IEER) Systems—up to 400 deployments over the course of 5 years (an average of 80 per year);

(E) Missile exercises (A-S MISSILEX)—up to 20 exercises over the course of 5 years (an average of 4 per year).

(d) The taking of marine mammals may be authorized in an LOA for the

activities and sources listed in § 218.120(c) should the amounts (*i.e.*, hours, dips, number of exercises) vary from those estimated in § 218.120(c), provided that the variation does not result in exceeding the amount of take indicated in § 218.122(c).

#### § 218.121 Effective dates.

Amended regulations in this subpart are effective February 1, 2012, through May 4, 2016.

[77 FR 4925, Feb. 1, 2012]

#### § 218.122 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.127 of this chapter, the Holder of the Letter of Authorization (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in § 218.120(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 218.120(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.120(c) is limited to the species listed below in paragraphs (c)(4) and (5) of this section by the indicated method of take and the indicated number of times (estimated based on the authorized amounts of sound source operation), but with the following allowances for annual variation in activities:

(1) In any given year, annual take, by harassment, of any species of marine mammal may not exceed the amount identified in paragraphs (c)(4) and (5) of this section, for that species by more than 25 percent (a post-calculation/estimation of which must be provided in the annual LOA application);

(2) In any given year, annual take by harassment of all marine mammal species combined may not exceed the estimated total of all species combined, indicated in paragraphs (c)(4) and (5) of this section, by more than 10 percent; and

(3) Over the course of the effective period of this subpart, total take, by harassment, of any species may not exceed the 5-year amounts indicated in paragraphs (c)(4) and (5) of this section by more than 10 percent. A running calculation/estimation of takes of each species over the course of the years covered by the rule must be maintained.

(4) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*)—6,975 (an average of 1,395 annually);

(B) Fin whale (*Balaenoptera physalus*)—55,185 (an average of 11,037 annually);

(C) Blue whale (*Balaenoptera musculus*)—10 (an average of 2 annually);

(D) Sei whale (*Balaenoptera borealis*)—40 (an average of 8 annually);

(E) Minke whale (*Balaenoptera acutorostrata*)—3,405 (an average of 681 annually);

(F) Gray whale (*Eschrichtius robustus*)—1,940 (an average of 388 annually); and

(G) North Pacific right whale (*Eubalaena japonica*)—10 (an average of 2 annually).

(ii) Odontocetes:

(A) Sperm whales (*Physeter macrocephalus*)—1,645 (an average of 329 annually);

(B) Killer whale (*Orcinus orca*)—53,245 (an average of 10,649 annually);

(C) Harbor porpoise (*Phocoena phocoena*)—27,200 (an average of 5,440 annually);

(D) Baird's beaked whales (*Berardius bairdii*)—2,435 (an average of 487 annually);

(E) Cuvier's beaked whales (*Ziphius cavirostris*)—11,560 (an average of 2,312 annually);

(F) Stejneger's beaked whales (*Mesoplodon stejnegeri*)—11,565 (an average of 2,313 annually);

(G) Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)—84,955 (an average of 16,991 annually); and

(H) Dall's porpoise (*Phocoenoides dalli*)—1,031,870 (an average of 206,374 annually).

(iii) Pinnipeds:

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(A) Steller sea lion (*Eumetopias jubatus*)—55,540 (an average of 11,108 annually);

(B) California sea lion (*Zalophus californianus*)—10 (an average of 2 annually);

(C) Harbor seal (*Phoca vitulina richardsi*)—10 (an average of 2 annually);

(D) Northern elephant seal (*Mirounga angustirostris*)—10,345 (an average of 2,069 annually); and

(E) Northern fur seal (*Callorhinus ursinus*)—771,010 (an average of 154,202 annually).

(5) Level A Harassment and/or mortality of no more than 15 beaked whales (total), of any of the species listed in § 218.122(c)(1)(ii)(D) through (F) over the course of the 5-year regulations.

### § 218.123 Prohibitions.

No person in connection with the activities described in § 218.120 may:

(a) Take any marine mammal not specified in § 218.122(c);

(b) Take any marine mammal specified in § 218.122(c) other than by incidental take as specified in §§ 218.122(c)(1), (c)(2), and (c)(3);

(c) Take a marine mammal specified in § 218.122(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §§ 216.106 and 218.127 of this chapter.

### § 218.124 Mitigation.

(a) When conducting training and utilizing the sound sources or explosives identified in § 218.120(c), the mitigation measures contained in a Letter of Authorization issued under §§ 216.106 and 218.127 of this chapter must be implemented. These mitigation measures include, but are not limited to:

(1) Personnel Training (for all Training Types):

(i) All commanding officers (COs), executive officers (XOs), Lookouts, Officers of the Deck (OODs), junior OODs (JOODs), maritime patrol aircraft aircrews, and Anti-Submarine Warfare (ASW) helicopter crews shall complete

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the NMFS-approved Marine Species Awareness Training (MSAT) by viewing the U.S. Navy MSAT digital versatile disk (DVD). All bridge Lookouts shall complete both parts one and two of the MSAT; part two is optional for other personnel.

(ii) Navy Lookouts shall undertake extensive training in order to qualify as a watchstander in accordance with the Lookout Training Handbook (Naval Education and Training Command [NAVEDTRA] 12968-D).

(iii) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced Lookout. Following successful completion of this supervised training period, Lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects). Personnel being trained as Lookouts can be counted among required Lookouts as long as supervisors monitor their progress and performance.

(iv) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if marine species are spotted.

(v) All Lookouts onboard platforms involved in ASW training events shall review the NMFS-approved Marine Species Awareness Training material prior to use of mid-frequency active sonar.

(vi) All COs, XOs, and officers standing watch on the bridge shall have reviewed the Marine Species Awareness Training material prior to a training event employing the use of MFAS/HFAS.

(2) General Operating Procedures (for all Training Types):

(i) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species protective measures.

(ii) COs shall make use of marine species detection cues and information to

limit interaction with marine mammals to the maximum extent possible consistent with safety of the ship.

(iii) While underway, surface vessels shall have at least two Lookouts with binoculars; surfaced submarines shall have at least one Lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, Lookouts shall watch for and report to the OOD the presence of marine mammals.

(iv) On surface vessels equipped with mid-frequency active sonar, pedestal mounted "Big Eye" (20×110) binoculars shall be properly installed and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(v) Personnel on Lookout shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(vi) After sunset and prior to sunrise, Lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(vii) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed," which means the speed at which the CO can maintain crew safety and effectiveness of current operational directives, so that the vessel can take action to avoid a collision with any marine mammal.

(viii) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and take all reasonable and practicable actions to avoid collisions and activities that might result in close interaction of naval assets and marine mammals. Such action may include changing speed and/or direction and are dictated by environmental and other conditions (e.g., safety, weather).

(ix) Navy aircraft participating in exercises at sea shall conduct and maintain surveillance for marine mammals as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(x) All marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate when it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(xi) Naval vessels shall maneuver to keep at least 1,500 ft (500 yd or 457 m) away from any observed whale in the vessel's path and avoid approaching whales head-on. These requirements do not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged activities, launching and recovering aircraft or landing craft, mine-sweeping activities, replenishment while underway and towing activities that severely restrict a vessel's ability to deviate course. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale. Given rapid swimming speeds and maneuverability of many dolphin species, naval vessels would maintain normal course and speed on sighting dolphins unless some condition indicated a need for the vessel to maneuver.

(3) Operating Procedures (for Anti-submarine Warfare (ASW) Operations):

(i) On the bridge of surface ships, there shall always be at least three people on watch whose duties include observing the water surface around the vessel.

(ii) All surface ships participating in ASW training events shall have, in addition to the three personnel on watch noted in paragraph (i), at least two additional personnel on watch as Lookouts at all times during the exercise.

(iii) Personnel on Lookout and officers on watch on the bridge shall have at least one set of binoculars available for each person to aid in the detection of marine mammals.

(iv) Personnel on Lookout shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to



the Officer of the Deck, since any object or disturbance (*e.g.*, trash, periscope, surface disturbance, discoloration) in the water may be indicative of a threat to the vessel and its crew or indicative of a marine mammal that may need to be avoided as warranted.

(v) All personnel engaged in passive acoustic sonar operation (including aircraft, surface ships, or submarines) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the appropriate watch station for dissemination and appropriate action.

(vi) During mid-frequency active sonar operations, personnel shall utilize all available sensor and optical systems (such as night vision goggles) to aid in the detection of marine mammals.

(vii) Aircraft with deployed sonobuoys shall use only the passive capability of sonobuoys when marine mammals are detected within 200 yd (183 m) of the sonobuoy.

(viii) Helicopters shall observe/survey the vicinity of an ASW exercise for 10 minutes before the first deployment of active (dipping) sonar in the water.

(ix) Helicopters shall not dip their sonar within 200 yd (183 m) of a marine mammal and shall cease pinging if a marine mammal closes within 200 yd (183 m) of the sound source after pinging has begun.

(x) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard Lookout, or acoustically) within 1,000 yd (914 m) of the sonar dome (the bow), the ship or submarine shall limit active transmission levels to at least 6 decibels (dB) below normal operating levels for that source (*i.e.*, limit to at most 229 dB for AN/SQS-53 and 219 for AN/SQS-56, *etc.*).

(A) Ships and submarines shall continue to limit maximum transmission levels by this 6-dB factor until the animal has been seen to leave the 1,000-yd (914 m) exclusion zone, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yds (1,829 m) beyond the location of the last detection.

(B) Should a marine mammal be detected within 500 yd (457 m) of the sonar dome, active sonar transmissions shall be limited to at least 10 dB below

the equipment's normal operating level (*i.e.*, limit to at most 225 dB for AN/SQS-53 and 215 for AN/SQS-56, *etc.*). Ships and submarines shall continue to limit maximum ping levels by this 10-dB factor until the animal has been seen to leave the 500-yd (457 m) safety zone (at which point the 6-dB powerdown applies until the animal leaves the 1,000-yd (914 m) safety zone), has not been detected for 30 minutes, or the vessel has transited more than 2,000 yd (1,829 m) beyond the location of the last detection.

(C) Should the marine mammal be detected within 200 yd (183 m) of the sonar dome, active sonar transmissions shall cease. Sonar shall not resume until the animal has been seen to leave the 200-yd (183 m) safety zone (at which point the 10-dB or 6-dB powerdowns apply until the animal leaves the 500-yd (457 m) or 1,000-yd (914 m) safety zone, respectively), has not been detected for 30 minutes, or the vessel has transited more than 2,000 yd (1,829 m) beyond the location of the last detection.

(D) Special conditions applicable for dolphins and porpoises only: If, after conducting an initial maneuver to avoid close quarters with dolphins or porpoises, the OOD concludes that dolphins or porpoises are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins or porpoises continue to exhibit bow wave riding behavior.

(xi) Prior to start up or restart of active sonar, operators shall check that the Safety Zone radius around the sound source is clear of marine mammals.

(xii) Active sonar levels (generally)—Navy shall operate active sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives.

(xiii) Submarine sonar operators shall review detection indicators of close-aboard marine mammals prior to the commencement of ASW training events involving MFAS.

NOTE TO PARAGRAPH (a)(3): If the need for power-down should arise (as detailed in 218.114(a)(3)(x)) when the Navy is operating a hull-mounted or sub-mounted source above 235 db (infrequent), the Navy shall follow the

requirements as though they were operating at 235 dB—the normal operating level (*i.e.*, the first power-down will be to 229 dB, regardless of at what level above 235 dB active sonar was being operated).

(4) Sinking Exercise:

(i) All weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset.

(ii) An exclusion zone with a radius of 1.0 nm (1.9 km) shall be established around each target. An additional buffer of 0.5 nm (0.9 km) will be added to account for errors, target drift, and animal movements. Additionally, a safety zone, which will extend beyond the buffer zone by an additional 0.5 nm (0.9 km), shall be surveyed. Together, the zones extend out 2 nm (3.7 km) from the target.

(iii) A series of surveillance overflights shall be conducted within the exclusion and the safety zones, prior to and during the exercise, when feasible. Survey protocol shall be as follows:

(A) Overflights within the exclusion zone shall be conducted in a manner that optimizes the surface area of the water observed. This may be accomplished through the use of the Navy's Search and Rescue Tactical Aid, which provides the best search altitude, ground speed, and track spacing for the discovery of small, possibly dark objects in the water based on the environmental conditions of the day. These environmental conditions include the angle of sun inclination, amount of daylight, cloud cover, visibility, and sea state.

(B) All visual surveillance activities shall be conducted by Navy personnel trained in visual surveillance. At least one member of the mitigation team shall have completed the Navy's marine mammal training program for Lookouts.

(C) In addition to the overflights, the exclusion zone shall be monitored by passive acoustic means, when assets are available. This passive acoustic monitoring shall be maintained throughout the exercise. Potential assets include sonobuoys, which can be utilized to detect any vocalizing marine mammals (particularly sperm whales) in the vicinity of the exercise. The sonobuoys shall be re-seeded as

necessary throughout the exercise. Additionally, if submarines are present, passive sonar onboard submarines may be utilized to detect any vocalizing marine mammals in the area. The OCE shall be informed of any aural detection of marine mammals and shall include this information in the determination of when it is safe to commence the exercise.

(D) On each day of the exercise, aerial surveillance of the exclusion and safety zones shall commence 2 hours prior to the first firing.

(E) The results of all visual, aerial, and acoustic searches shall be reported immediately to the OCE. No weapons launches or firing may commence until the OCE declares the safety and exclusion zones free of marine mammals.

(F) If a marine mammal is observed within the exclusion zone, firing shall be delayed until the animal is re-sighted outside the exclusion zone, or 30 minutes have elapsed. After 30 minutes, if the animal has not been re-sighted it can be assumed to have left the exclusion zone. The OCE shall determine if the marine mammal is in danger of being adversely affected by commencement of the exercise.

(G) During breaks in the exercise of 30 minutes or more, the exclusion zone shall again be surveyed for any marine mammal. If marine mammals are sighted within the exclusion zone or buffer zone, the OCE shall be notified, and the procedure described above shall be followed.

(H) Upon sinking of the vessel, a final surveillance of the exclusion zone shall be monitored for 2 hours, or until sunset, to verify that no marine mammals were harmed.

(iv) Aerial surveillance shall be conducted using helicopters or other aircraft based on necessity and availability.

(v) Where practicable, the Navy shall conduct the exercise in sea states that are ideal for marine mammal sighting, Beaufort Sea State 3 or less. In the event of a Beaufort Sea State 4 or above, survey efforts shall be increased within the zones. This shall be accomplished through the use of an additional aircraft, if available, and conducting tight search patterns.

(vi) The exercise shall not be conducted unless the exclusion zone can be adequately monitored visually.

(vii) In the event that any marine mammals are observed to be harmed in the area, NMFS shall be notified as soon as feasible following the stranding communication protocol. A detailed description of the animal shall be taken, the location noted, and if possible, photos taken of the marine mammal. This information shall be provided to NMFS via the Navy's regional environmental coordinator for purposes of identification (see the draft Stranding Plan for detail).

(viii) An after action report detailing the exercise's time line, the time the surveys commenced and terminated, amount, and types of all ordnance expended, and the results of survey efforts for each event shall be submitted to NMFS.

(5) Surface-to-Surface Gunnery (up to 5-inch Explosive Rounds):

(i) For exercises using targets towed by a vessel, target-towing vessels shall maintain a trained Lookout for marine mammals when feasible. If a marine mammal is sighted in the vicinity, the tow vessel shall immediately notify the firing vessel, which shall suspend the exercise until the area is clear.

(ii) A 600-yd (585 m) radius buffer zone shall be established around the intended target.

(iii) From the intended firing position, trained Lookouts shall survey the buffer zone for marine mammals prior to commencement and during the exercise as long as practicable. Due to the distance between the firing position and the buffer zone, Lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

(iv) The exercise shall be conducted only when the buffer zone is visible and marine mammals are not detected within it.

(6) Surface-to-Surface Gunnery (non-explosive rounds):

(i) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(ii) From the intended firing position, trained Lookouts shall survey the buffer zone for marine mammals prior

to commencement and during the exercise as long as practicable.

(iii) If available, target-towing vessels shall maintain a Lookout (unmanned towing vessels will not have a Lookout available). If a marine mammal is sighted in the vicinity of the exercise, the tow vessel shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(iv) The exercise shall be conducted only when the buffer zone is visible and marine mammals are not detected within the target area and the buffer zone.

(7) Surface-to-Air Gunnery (Explosive and Non-explosive Rounds):

(i) Vessels shall orient the geometry of gunnery exercises in order to prevent debris from falling in the area of sighted marine mammals.

(ii) Vessels shall expedite the attempt to recover any parachute deploying aerial targets to reduce the potential for entanglement of marine mammals.

(iii) Target-towing aircraft shall maintain a Lookout if feasible. If a marine mammal is sighted in the vicinity of the exercise, the tow aircraft shall immediately notify the firing vessel in order to secure gunnery firing until the area is clear.

(8) Air-to-Surface Gunnery (Explosive and Non-explosive Rounds):

(i) A 200-yd (183 m) radius buffer zone shall be established around the intended target.

(ii) If surface vessels are involved, Lookout(s) shall visually survey the buffer zone for marine mammals prior to commencement and during the exercise.

(iii) Aerial surveillance of the buffer zone for marine mammals shall be conducted prior to commencement of the exercise. Aerial surveillance altitude of 500 ft to 1,500 ft (152–456 m) is optimum. Aircraft crew/pilot shall maintain visual watch during exercises. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(iv) The exercise shall be conducted only if marine mammals are not visible within the buffer zone.

(9) Small Arms Training (Grenades, Explosive and Non-explosive Rounds)—

Lookouts shall visually survey for marine mammals. Weapons shall not be fired in the direction of known or observed marine mammals.

(10) Air-to-Surface At-sea Bombing Exercises (explosive bombs and rockets):

(i) If surface vessels are involved, trained Lookouts shall survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yd (914 m) of known or observed marine mammals.

(ii) A 1,000-yd (914 m) radius buffer zone shall be established around the intended target.

(iii) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited: Aircraft must be able to see ordnance impact areas. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise shall be conducted only if marine mammals are not visible within the buffer zone.

(11) Air-to-Surface At-Sea Bombing Exercises (Non-explosive Bombs and Rockets):

(i) If surface vessels are involved, trained Lookouts shall survey for marine mammals. Ordnance shall not be targeted to impact within 1,000 yd (914 m) of known or observed marine mammals.

(ii) A 1,000-yd (914 m) radius buffer zone shall be established around the intended target.

(iii) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited: Aircraft must be able to actually see ordnance impact areas. Survey aircraft shall employ most effective search tactics and capabilities.

(iv) The exercise shall be conducted only if marine mammals are not visible within the buffer zone.

(12) Air-to-Surface Missile Exercises (explosive and non-explosive):

(i) Aircraft shall visually survey the target area for marine mammals. Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) or lower, if safe to do so, and at the slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas.

(ii) Explosive ordnance shall not be targeted to impact within 1,800 yd (1646 m) of sighted marine mammals.

(13) Aircraft Training Activities Involving Non-Explosive Devices:

(i) Non-explosive devices such as some sonobuoys and inert bombs involve aerial drops of devices that have the potential to hit marine mammals if they are in the immediate vicinity of a floating target. The exclusion zone (200 yd), therefore, shall be clear of marine mammals and around the target location.

(ii) [Reserved]

(14) Extended Echo Ranging/Improved Extended Echo Ranging (EER/IEER):

(i) Crews shall conduct visual reconnaissance of the drop area prior to laying their intended sonobuoy pattern. This search shall be conducted at an altitude below 500 yd (457 m) at a slow speed, if operationally feasible and weather conditions permit. In dual aircraft operations, crews are allowed to conduct coordinated area clearances.

(ii) Crews shall conduct a minimum of 30 minutes of visual and aural monitoring of the search area prior to commanding the first post detonation. This 30-minute observation period may include pattern deployment time.

(iii) For any part of the intended sonobuoy pattern where a post (source/receiver sonobuoy pair) shall be deployed within 1,000 yd (914 m) of observed marine mammal activity, the Navy shall deploy the receiver ONLY and monitor while conducting a visual search. When marine mammals are no longer detected within 1,000 yd (914 m) of the intended post position, the Navy shall co-locate the explosive source sonobuoy (AN/SSQ-110A) (source) with the receiver.

(iv) When operationally feasible, Navy crews shall conduct continuous visual and aural monitoring of marine mammal activity. This is to include

monitoring of own-aircraft sensors from first sensor placement to checking off station and out of RF range of these sensors.

(v) Aural Detection—If the presence of marine mammals is detected aurally, then that shall cue the Navy aircrew to increase the diligence of their visual surveillance. Subsequently, if no marine mammals are visually detected, then the crew may continue multi-static active search.

(vi) Visual Detection—If marine mammals are visually detected within 1,000 yd (914 m) of the explosive source sonobuoy (AN/SSQ-110A) intended for use, then that payload shall not be detonated. Aircrews may utilize this post once the marine mammals have not been re-sighted for 30 minutes, or are observed to have moved outside the 1,000-yd (914 m) safety buffer. Aircrews may shift their multi-static active search to another post, where marine mammals are outside the 1,000-yd (914 m) safety buffer.

(vii) Aircrews shall make every attempt to manually detonate the unexploded charges at each post in the pattern prior to departing the operations area by using the “Payload 1 Release” command followed by the “Payload 2 Release” command. Aircrews shall refrain from using the “Scuttle” command when two payloads remain at a given post. Aircrews shall ensure that a 1,000-yd (914 m) safety buffer, visually clear of marine mammals, is maintained around each post as is done during active search operations.

(viii) Aircrews shall only leave posts with unexploded charges in the event of a sonobuoy malfunction, an aircraft system malfunction, or when an aircraft must immediately depart the area due to issues such as fuel constraints, inclement weather, and in-flight emergencies. In these cases, the sonobuoy shall self-scuttle using the secondary or tertiary method.

(ix) The Navy shall ensure all payloads are accounted for. Explosive source sonobuoys (AN/SSQ-110A) that cannot be scuttled shall be reported as unexploded ordnance via voice communications while airborne, then upon landing via naval message.

(x) Marine mammal monitoring shall continue until out of own-aircraft sensor range.

(15) The Navy shall abide by the letter of the “Stranding Response Plan for Major Navy Training Exercises in the GoA TMAA” (available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>), which is incorporated herein by reference, to include the following measures:

(i) Shutdown Procedures—When an Uncommon Stranding Event (USE—defined in §216.271) occurs during a Major Training Exercise (MTE) (as defined in the Stranding Plan, meaning including Multi-strike group exercises, Joint Expeditionary exercises, and Marine Air Ground Task Force exercises in the GoA TMAA), the Navy shall implement the procedures described below.

(A) The Navy shall implement a Shutdown (as defined in the Stranding Response Plan for GoA TMAA) when advised by a NMFS Office of Protected Resources Headquarters Senior Official designated in the GoA TMAA Stranding Communication Protocol that a USE (as defined in the Stranding Response Plan for the GoA TMAA) involving live animals has been identified and that at least one live animal is located in the water. NMFS and Navy shall communicate, as needed, regarding the identification of the USE and the potential need to implement shutdown procedures.

(B) Any shutdown in a given area shall remain in effect in that area until NMFS advises the Navy that the subject(s) of the USE at that area die or are euthanized, or that all live animals involved in the USE at that area have left the area (either of their own volition or herded).

(C) If the Navy finds an injured or dead marine mammal floating at sea during an MTE, the Navy shall notify NMFS immediately or as soon as operational security considerations allow. The Navy shall provide NMFS with the species or description of the animal(s), the condition of the animal(s) including carcass condition if the animal(s) is/are dead, location, time of first discovery, observed behavior(s) (if alive), and photo or video of the animal(s) (if available). Based on the information provided, NMFS shall determine if, and

advise the Navy whether a modified shutdown is appropriate on a case-by-case basis.

(D) In the event, following a USE, that: Qualified individuals are attempting to herd animals back out to the open ocean and animals are not willing to leave, or animals are seen repeatedly heading for the open ocean but turning back to shore, NMFS and the Navy shall coordinate (including an investigation of other potential anthropogenic stressors in the area) to determine if the proximity of MFAS/HFAS activities or explosive detonations, though farther than 14 nm from the distressed animal(s), is likely decreasing the likelihood that the animals return to the open water. If so, NMFS and the Navy shall further coordinate to determine what measures are necessary to further minimize that likelihood and implement those measures as appropriate.

(ii) Within 72 hrs of NMFS notifying the Navy of the presence of a USE, the Navy shall provide available information to NMFS (per the GoA TMAA Communication Protocol) regarding the location, number and types of acoustic/explosive sources, direction and speed of units using MFAS/HFAS, and marine mammal sightings information associated with training activities occurring within 80 nm (148 km) and 72 hrs prior to the USE event. Information not initially available regarding the 80 nm (148 km) and 72 hrs prior to the event shall be provided as soon as it becomes available. The Navy shall provide NMFS investigative teams with additional relevant unclassified information as requested, if available.

(iii) Memorandum of Agreement (MOA)—The Navy and NMFS shall develop a MOA, or other mechanism, that will establish a framework whereby the Navy can (and provide the Navy examples of how they can best) assist NMFS with stranding investigations in certain circumstances.

(b) [Reserved]

#### §218.125 Requirements for monitoring and reporting.

(a) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS is noti-

fied immediately ((see Communication Plan) or as soon as clearance procedures allow) if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing MFAS, HFAS, or underwater explosive detonations. The Navy shall provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behavior(s) (if alive), and photo or video of the animal(s) (if available). In the event that an injured, stranded, or dead marine mammal is found by the Navy that is not in the vicinity of, or during or shortly after, MFAS, HFAS, or underwater explosive detonations, the Navy shall report the same information as listed above as soon as operationally feasible and clearance procedures allow.

(b) General Notification of Ship Strike—In the event of a ship strike by any Navy vessel, at any time or place, the Navy shall do the following:

(1) Immediately report to NMFS the species identification (if known), location (lat/long) of the animal (or the strike if the animal has disappeared), and whether the animal is alive or dead, or whether its status is unknown.

(2) Report to NMFS as soon as operationally feasible the size and length of animal, an estimate of the injury status (*e.g.*, dead, injured but alive, injured and moving, unknown, *etc.*), vessel class/type and operational status.

(3) Report to NMFS the vessel length, speed, and heading as soon as feasible.

(4) Provide NMFS a photo or video of the animal(s), if equipment is available.

(c) The Navy must conduct all monitoring and/or research required under the Letter of Authorization including abiding by the GoA TMAA Monitoring Plan. (<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>)

(d) Report on Monitoring required in paragraph (c) of this section—The Navy shall submit a report annually on December 15 describing the implementation and results (through October of the same year) of the monitoring required in paragraph (c) of this section.

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The Navy shall standardize data collection methods across ranges to allow for comparison in different geographic locations.

(e) *Sonar Exercise Notification*—The Navy shall submit to the NMFS Office of Protected Resources (specific contact information to be provided in LOA) either an electronic (preferably) or verbal report within 15 calendar days after the completion of any MTER indicating:

- (1) Location of the exercise;
- (2) Beginning and end dates of the exercise; and
- (3) Type of exercise.

(f) *Annual GoA TMAA Report*—The Navy shall submit an Annual Exercise GoA TMAA Report on December 15 of every year (covering data gathered through October). This report shall contain the subsections and information indicated below.

(1) *MFAS/HFAS Training Exercises*—This section shall contain the following information for the following Coordinated and Strike Group exercises; Joint Multi-strike Group Exercises; Joint Expeditionary Exercises; and Marine Air Ground Task Force GoA TMAA:

(i) *Exercise Information* (for each exercise):

- (A) Exercise designator;
- (B) Date that exercise began and ended;
- (C) Location;
- (D) Number and types of active sources used in the exercise;
- (E) Number and types of passive acoustic sources used in exercise;
- (F) Number and types of vessels, aircraft, *etc.*, participating in exercise;
- (G) Total hours of observation by watchstanders;
- (H) Total hours of all active sonar source operation;
- (I) Total hours of each active sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, *etc.*)); and
- (J) Wave height (high, low, and average during exercise).

(ii) *Individual marine mammal sighting info* (for each sighting in each exercise):

- (A) Location of sighting;

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(B) Species (if not possible—indication of whale/dolphin/pinniped);

(C) Number of individuals;

(D) Calves observed (y/n);

(E) Initial Detection Sensor;

(F) Indication of specific type of platform observation made from (including, for example, what type of surface vessel; *i.e.*, FFG, DDG, or CG);

(G) Length of time observers maintained visual contact with marine mammal(s);

(H) Wave height (ft);

(I) Visibility;

(J) Sonar source in use (y/n);

(K) Indication of whether animal is <200 yd, 200–500 yd, 500–1,000 yd, 1,000–2,000 yd, or >2,000 yd from sonar source in (x) above;

(L) *Mitigation Implementation*—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was;

(M) If source in use (x) is hull-mounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel); and

(N) *Observed behavior*—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, *etc.*).

(iii) *An evaluation* (based on data gathered during all of the exercises) of the effectiveness of mitigation measures designed to avoid exposing marine mammals to MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) *ASW Summary*—This section shall include the following information as summarized from non-major training exercises (unit-level exercises, such as TRACKEXs):

(i) *Total Hours*—Total annual hours of each type of sonar source (along with explanation of how hours are calculated for sources typically quantified in alternate way (buoys, torpedoes, *etc.*)).

(ii) Cumulative Impacts—To the extent practicable, the Navy, in coordination with NMFS, shall develop and implement a method of annually reporting other training (*i.e.*, Unit Level Training (ULT)) utilizing hull-mounted sonar. The report shall present an annual (and seasonal, where practicable) depiction of non-major training exercises geographically across the GoA TMAA. The Navy shall include (in the GoA TMAA annual report) a brief annual progress update on the status of the development of an effective and unclassified method to report this information until an agreed-upon (with NMFS) method has been developed and implemented.

(3) Sinking Exercises (SINKEXs)—This section shall include the following information for each SINKEX completed that year:

(i) Exercise info:

(A) Location;

(B) Date and time exercise began and ended;

(C) Total hours of observation by watchstanders before, during, and after exercise;

(D) Total number and types of rounds expended/explosives detonated;

(E) Number and types of passive acoustic sources used in exercise;

(F) Total hours of passive acoustic search time;

(G) Number and types of vessels, aircraft, *etc.*, participating in exercise;

(H) Wave height in feet (high, low, and average during exercise); and

(I) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(ii) Individual marine mammal observation during SINKEX (by Navy Lookouts) information:

(A) Location of sighting;

(B) Species (if not possible—indication of whale/dolphin/pinniped);

(C) Number of individuals;

(D) Calves observed (y/n);

(E) Initial detection sensor;

(F) Length of time observers maintained visual contact with marine mammal;

(G) Wave height (ft);

(H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated)—use four categories to define distance:

(1) The modeled injury threshold radius for the largest explosive used in that exercise type in that OPAREA (762 m for SINKEX in the GoA TMAA);

(2) The required exclusion zone (1 nm for SINKEX in the GoA TMAA);

(3) The required observation distance (if different than the exclusion zone (2 nm for SINKEX in the GoA TMAA); and

(4) Greater than the required observed distance. For example, in this case, the observer shall indicate if <762 m, from 762 m–1 nm, from 1 nm–2 nm, and >2 nm.

(K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming *etc.*), including speed and direction.

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(4) Improved Extended Echo-Ranging System (IEER) Summary:

(i) Total number of IEER events conducted in the GoA TMAA;

(ii) Total expended/detonated rounds (buoys); and

(iii) Total number of self-scuttled IEER rounds.

(5) Explosives Summary—The Navy is in the process of improving the methods used to track explosive use to provide increased granularity. To the extent practicable, the Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's



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explosive tracking methods, including improvements from the previous year.

(i) Total annual number of each type of explosive exercise (of those identified as part of the “specified activity” in this final rule) conducted in the GoA TMAA; and

(ii) Total annual expended/detonated rounds (missiles, bombs, *etc.*) for each explosive type.

(g) GoA TMAA 5-Yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during ASW and explosive exercises for which annual reports are required (Annual GoA TMAA Exercise Reports and GoA TMAA Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (December 2014), covering activities that have occurred through October 2014.

(h) Comprehensive National ASW Report—By June, 2014, the Navy shall submit a draft National Report that analyzes, compares, and summarizes the active sonar data gathered (through January 1, 2014) from the watchstanders and pursuant to the implementation of the Monitoring Plans for the Northwest Training Range Complex, the Southern California Range Complex, the Atlantic Fleet Active Sonar Training, the Hawaii Range Complex, the Mariana Islands Range Complex, and the Gulf of Alaska.

(i) The Navy shall comply with the Integrated Comprehensive Monitoring Program (ICMP) Plan and continue to improve the program in consultation with NMFS.

## §218.126 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by §216.103 of this chapter) conducting the activity identified in §218.120(c) (*i.e.*, the Navy) must apply for and obtain either an initial Letter of Authorization in accordance with §218.127 or a renewal under §218.128.

## §218.127 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the peri-

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ods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in §218.128 and the modification conditions in §218.129.

(b) Each Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[76 FR 25505, May 4, 2011, as amended at 77 FR 4925, Feb. 1, 2012]

## §218.128 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under §216.106 of this chapter and §218.127 for the activity identified in §218.120(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under §218.126 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Receipt of the monitoring reports and notifications within the indicated timeframes required under §218.125(b) through j); and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §218.124 and the Letter of Authorization issued under §216.106 of this chapter and §218.127, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.126 and 216.128 indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken

during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from the GoA TMAA or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011.

(3) Compiled results of Navy-funded research and development (R&D) studies (presented pursuant to the Integrated Comprehensive Monitoring Plan).

(4) Results from specific stranding investigations (either from the GoA TMAA or other locations, and involving coincident MFAS/HFAS or explosives training or not involving coincident use).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

[76 FR 25505, May 4, 2011, as amended at 77 FR 4925, Feb. 1, 2012]

#### **§ 218.129 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.126 and 218.127 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.128, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.120(b), a Letter of Authorization issued pursuant to §§ 216.126 and 218.127 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

#### **Subparts O–Q [Reserved]**

#### **Subpart R—Taking Marine Mammals Incidental to U.S. Navy Research, Development, Test, and Evaluation Activities in the Naval Sea System Command (NAVSEA) Naval Undersea Warfare Center (NUWC) Keyport Range Complex and the Associated Proposed Extensions Study Area**

SOURCE: 76 FR 20274, Apr. 12, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 20274, Apr. 12, 2011, subpart R was added, effective Apr. 11, 2011 through Apr. 11, 2016.

#### **§ 218.170 Specified activity and specified geographical area and effective dates.**

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occur in the area outlined in paragraph (b) of this

section and that occur incidental to the activities described in paragraph (c) of this section.

(b) These regulations apply only to the taking of marine mammals by the Navy that occurs within the Keyport Range Complex Action Area, which includes the extended Keyport Range Site, the extended Dabob Bay Range Complex (DBRC) Site, and the extended Quinault Underwater Tracking Range (QUTR) Site, as presented in the Navy's LOA application. The NAVSEA NUWC Keyport Range Complex is divided into open ocean/offshore areas and in-shore areas:

(1) Open Ocean Area—air, surface, and subsurface areas of the NAVSEA NUWC Keyport Range Complex Extension that lie outside of 12 nautical miles (nm) from land.

(2) Offshore Area—air, surface, and subsurface ocean areas within 12 nm of the Pacific Coast.

(3) In-shore—air, surface, and subsurface areas within the Puget Sound, Port Orchard Reach, Hood Canal, and Dabob Bay.

(c) These regulations apply only to the taking of marine mammals by the Navy if it occurs incidental to the following activities, or similar activities, and sources, or similar sources (estimate amounts of use below):

(1) Range Activities Using Active Acoustic Devices:

(i) General range tracking: Narrow frequency output between 10 to 100 kHz with source levels (SL) between 195–203 dB re 1 microPa @ 1 m—up to 504.5 hours per year.

(ii) UUV Payloads: Operating frequency of 10 to 100 kHz with SLs less than 195 dB re 1 microPa @ 1 m at all range sites—up to 166 hours per year.

(iii) Torpedo Sonars: Operating frequency from 10 to 100 kHz with SL under 233 dB re 1 microPa @ 1 m—up to 21 hours per year.

(iv) Range Targets and Special Test Systems: 5 to 100 kHz frequency range with a SL less than 195 dB re 1 microPa @ 1 m at the Keyport Range Site and SL less than 238 dB re microPa @ 1 m at the DBRC and QUTR sites—up to 9 hours per year.

(v) Special Sonars (non-Navy, shore/pire static testing, diver activities) and Fleet Aircraft (active sonobuoys and dipping sonars): Frequencies vary from 100 to 2,500 kHz with SL less than 235 dB re 1 microPa @ 1 m—up to 321 hours per year.

(vi) Side Scan Sonar: Multiple frequencies typically at 100 to 700 kHz with SLs less than 235 dB re 1 microPa @ 1 m—up to 166 hours per year.

(vii) Other Acoustic Sources:

(A) Acoustic Modems: Emit pulses at frequencies from 10 to 300 kHz with SLs less than 210 dB re 1 microPa @ 1 m—up to 166 hours per year.

(B) Sub-bottom Profilers: Operate at 2 to 7 kHz at SLs less than 210 dB re 1 microPa @ 1 m, and 35 to 45 kHz at SLs less than 220 dB re 1 microPa @ 1 m—up to 192 hours per year.

(C) Target simulator (surface vessels, submarines, torpedoes, and UUV engine noise): Acoustic energy from engines usually from 50 Hz to 10 kHz at SLs less than 170 dB re 1 microPa @ 1 m—up to 24.5 hours per year.

(2) Increased Tempo and Activities due to Range Extension: Estimates of annual range activities and operations are listed in the following table, but may vary provided that the variation does not result in exceeding the amount of take indicated in §218.171(c):

Range activity	Platform/system used	Proposed number of activities/year <sup>1</sup>		
		Keyport range site	DBRC site	QUTR site
Test Vehicle Propulsion .....	Thermal propulsion systems .....	5	130	30
	Electric/Chemical propulsion systems .....	55	140	30
Other Testing Systems and Activities.	Submarine testing .....	0	45	15
	Inert mine detection, classification and localization.	5	20	10
	Non-Navy testing .....	5	5	5
	Acoustic & non-acoustic sensors (magnetic array, oxygen).	20	10	5
	Countermeasure test .....	5	50	5
	Impact testing .....	0	10	5
	Static in-water testing .....	10	10	6
	UUV test .....	45	120	40

Range activity	Platform/system used	Proposed number of activities/year <sup>1</sup>		
		Keyport range site	DBRC site	QUTR site
Fleet Activities <sup>2</sup> (excluding RDT&E).	Unmanned Aerial System (UAS) test .....	0	2	2
	Surface Ship activities .....	1	10	10
	Aircraft activities .....	0	10	10
	Submarine activities .....	0	30	30
Deployment Systems (RDT&E).	Diver activities .....	45	5	15
	Range support vessels: .....			
	Surface launch craft .....	35	180	30
	Special purpose barges .....	25	75	0
	Fleet vessels <sup>3</sup> .....	15	20	20
	Aircraft (rotary and fixed wing) .....	0	10	20
	Shore and pier .....	45	30	30

<sup>1</sup> There may be several activities in 1 day. These numbers provide an estimate of types of range activities over the year.

<sup>2</sup> Fleet activities in the NAVSEA NUWC Keyport Range Complex do not include the use of surface ship and submarine hull-mounted active sonars.

<sup>3</sup> As previously noted, Fleet vessels can include very small craft such as SEAL Delivery Vehicles.

(d) Amended regulations are effective February 1, 2012, through April 11, 2016.

(e) The taking of marine mammals may be authorized in an LOA for the activities and sources listed in §218.170(c) should the amounts (e.g., hours, number of exercises) vary from those estimated in §218.170(c), provided that the variation does not result in exceeding the amount of take indicated in §218.171(c).

[76 FR 20274, Apr. 12, 2011, as amended at 77 FR 4925, Feb. 1, 2012]

#### §218.171 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 218.176 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in §218.170(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in §218.170(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in §218.170(c) is limited to the following species, by Level B harassment only and the indicated number of times:

(1) Harbor porpoise (*Phocoena phocoena*)—56,415 (an average of 11,283 annually);

(2) Northern fur seal (*Callorhinus ursinus*)—220 (an average of 44 annually);

(3) California sea lion (*Zalophus californianus*)—570 (an average of 114 annually);

(4) Northern elephant seal (*Mirounga angustirostris*)—70 (an average of 14 annually);

(5) Harbor seal (*Phoca vitulina richardsi*) (Washington Inland Waters stock)—27,340 (an average of 5,468 annually); and

(6) Harbor seal (*P. v. richardsi*) (Oregon/Washington Coastal stock)—505 (an average of 101 annually).

#### §218.172 Prohibitions.

Notwithstanding takings contemplated in §218.171 and authorized by a Letter of Authorization issued under §216.106 of this chapter and §218.176, no person in connection with the activities described in §218.170 may:

(a) Take any marine mammal not specified in §218.171(c);

(b) Take any marine mammal specified in §218.171(c) other than by incidental take as specified in §218.171 (c);

(c) Take a marine mammal specified in §218.171(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter

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of Authorization issued under §216.106 of this chapter and §218.176.

### §218.173 Mitigation.

When conducting RDT&E activities identified in §218.170(c), the mitigation measures contained in this subpart and subsequent Letters of Authorization issued under §216.106 of this chapter and §218.176 must be implemented. These mitigation measures include, but are not limited to:

(a) Marine mammal observers training:

(1) All range personnel shall be trained in marine mammal recognition.

(2) Marine mammal observer training shall be conducted by qualified organizations approved by NMFS.

(b) Lookouts onboard vessels:

(1) Vessels on a range shall use lookouts during all hours of range activities.

(2) Lookout duties include looking for marine mammals.

(3) All sightings of marine mammals shall be reported to the Range Officer in charge of overseeing the activity.

(c) Visual surveillance shall be conducted just prior to all in-water exercises.

(1) Surveillance shall include, as a minimum, monitoring from all participating surface craft and, where available, adjacent shore sites.

(2) When cetaceans have been sighted in the vicinity of the operation, all range participants increase vigilance and take reasonable and practicable actions to avoid collisions and activities that may result in close interaction of naval assets and marine mammals.

(3) Actions may include changing speed and/or direction, subject to environmental and other conditions (*e.g.*, safety, weather).

(d) An “exclusion zone” shall be established and surveillance will be conducted to ensure that there are no marine mammals within this exclusion zone prior to the commencement of each in-water exercise.

(1) For cetaceans, the exclusion zone shall extend out 1,000 yards (914.4 m) from the intended track of the test unit.

(2) For pinnipeds, the exclusion zone shall extend out 100 yards (91 m) from the intended track of the test unit.

(e) Range craft shall not approach within 100 yards (91 m) of marine mammals, to the extent practicable considering human and vessel safety priorities. This includes marine mammals “hailed-out” on islands, rocks, and other areas such as buoys.

(f) In the event of a collision between a Navy vessel and a marine mammal, NUWC Keyport activities shall notify immediately the Navy chain of Command, which shall notify NMFS immediately.

(g) Passive acoustic monitoring for cetaceans will be implemented throughout the NUWC Keyport Range Complex during RDT&E testing activities involving active sonar transmissions when passive acoustic monitoring capabilities are being operated during the testing activity.

(h) Procedures for reporting marine mammal sightings on the NAVSEA NUWC Keyport Range Complex shall be promulgated, and sightings shall be entered into the Range Operating System and forwarded to NOAA/NMML Platforms of Opportunity Program.

(i) If there is clear evidence that a marine mammal is injured or killed as a result of the proposed Navy RDT&E activities, the Naval activities shall be immediately suspended and the situation immediately reported by personnel involved in the activity to the Ranger Officer, who will follow Navy procedures for reporting the incident to NMFS through the Navy’s chain-of-command.

(j) For nighttime RDT&E activities of active acoustic transmissions in the Keyport Range proposed extension area, the Navy shall conduct passive acoustic monitoring within the Agate Pass and south of University Point in southern Port Orchard Reach. If Southern Resident killer whales are detected in the vicinity of the Keyport Range Site, the Range Office shall be notified immediately and the active acoustic sources must be shutdown if killer whales are confirmed to approach at 1,000 yards from the source.

**§218.174 Requirements for monitoring and reporting.**

(a) The Holder of the Letter of Authorization issued pursuant to §216.106 of this chapter and §218.176 for activities described in §218.170(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in §218.170(c) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified or authorized in §218.171(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the NAVSEA NUWC Keyport Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below:

(1) Visual Surveys:

(i) The Holder of this Authorization shall conduct a minimum of 2 special visual surveys per year to monitor HFAS and MFAS respectively at the DBRC Range site.

(ii) For specified events, shore-based and vessel surveys shall be used 1 day prior to and 1-2 days post activity.

(A) Shore-based Surveys:

(I) Shore-based monitors shall observe test events that are planned in advance to occur adjacent to near shore areas where there are elevated topography or coastal structures, and shall use binoculars or theodolite to augment other visual survey methods.

(2) Shore-based surveys of the test area and nearby beaches shall be conducted for stranded marine animals following nearshore events. If any distressed, injured or stranded animals are observed, an assessment of the animal's condition (alive, injured, dead, or degree of decomposition) shall be reported immediately to the Navy and the information shall be transmitted immediately to NMFS through the appropriate chain of command.

(B) Vessel-based Surveys:

(I) Vessel-based surveys shall be designed to maximize detections of ma-

rine mammals near mission activity event.

(2) Post-analysis shall focus on how the location, speed and vector of the range craft and the location and direction of the sonar source (*e.g.* Navy surface vessel) relates to the animal.

(3) Any other vessels or aircraft observed in the area shall also be documented.

(iii) Surveys shall include the range site with special emphasis given to the particular path of the test run. When conducting a particular survey, the survey team shall collect the following information.

(A) Species identification and group size;

(B) Location and relative distance from the acoustic source(s);

(C) The behavior of marine mammals including standard environmental and oceanographic parameters;

(D) Date, time and visual conditions associated with each observation;

(E) Direction of travel relative to the active acoustic source; and

(F) Duration of the observation.

(iv) Animal sightings and relative distance from a particular active acoustic source shall be used post-survey to determine potential received energy (dB re 1 micro Pa-sec). This data shall be used, post-survey, to estimate the number of marine mammals exposed to different received levels (energy based on distance to the source, bathymetry, oceanographic conditions and the type and power of the acoustic source) and their corresponding behavior.

(2) Passive Acoustic Monitoring (PAM):

(i) The Navy shall deploy a hydrophone array in the Keyport Range Complex Study Area for PAM.

(ii) The array shall be utilized during the two special monitoring surveys in DBRC as described in §218.174(c)(1)(i).

(iii) The array shall have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes.

(iv) Acoustic data collected from the PAM shall be used to detect acoustically active marine mammals as appropriate.

(3) Marine Mammal Observers on range craft or Navy vessels:

(i) Navy Marine mammal observers (NMMOs) may be placed on a range craft or Navy platform during the event being monitored.

(ii) The NMMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) NMMOs may be placed alongside existing lookouts during the two specified monitoring events as described in §218.174(c)(1)(i).

(iv) NMMOs shall inform the lookouts of any marine mammal sighting so that appropriate action may be taken by the chain of command. NMMOs shall schedule their daily observations to duplicate the lookouts' schedule.

(v) NMMOs shall observe from the same height above water as the lookouts, and they shall collect the same data collected by lookouts listed in §218.174(c)(1)(iii).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan.

(5) A method for standardizing data collection for NAVSEA NUWC Keyport Range Complex Extension and across range complexes.

(e) Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or short-

ly after, and in the vicinity of, any Navy activities utilizing sonar. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual Keyport Range Complex Monitoring Plan Report—The Navy shall submit a report annually by December 1 describing the implementation and results (through September 1 of the same year) of the Keyport Range Complex Monitoring Plan. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the NMMOs collecting marine mammal data pursuant to the Keyport Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in §218.174(c). The Keyport Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from Keyport Range Complex and multiple range complexes.

(g) Keyport Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft comprehensive report that analyzes and summarizes *all* of the multi-year marine mammal information gathered during tests involving active acoustic sources for which individual reports are required in §218.174 (d)–(f). This report will be submitted at the end of the fourth year of the rule (June 2013), covering activities that have occurred through September 1, 2013.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the Keyport Range Complex Extension Comprehensive Report, the Annual Keyport Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Report, it that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three

months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

**§218.175 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations for the activities identified in §218.170(c), the U.S. Navy must apply for and obtain either an initial Letter of Authorization in accordance with §218.176 or a renewal under §218.177.

**§218.176 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in §218.177 and the modification conditions in §218.178.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[76 FR 20274, Apr. 12, 2011, as amended at 77 FR 4925, Feb. 1, 2012]

**§218.177 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §§216.106 of this chapter and

218.176 for the activity identified in §218.170(c) will be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under §218.175 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Timely receipt of the monitoring reports required under §218.174(b); and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §218.173 and the Letter of Authorization issued under §216.106 of this chapter and §218.176, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.106 and 218.177 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Public comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either



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from Keyport Range Complex Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§218.174(i)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§218.174(d))).

(4) Results from specific stranding investigations (either from the Keyport Range Complex Study Area or other locations).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(7) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[76 FR 20274, Apr. 12, 2011, as amended at 77 FR 4925, Feb. 1, 2012]

### §218.178 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section and §218.177(d), no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §216.106 of this chapter and §218.176 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.177, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.171(b), a Letter of Authorization issued pursuant to §216.106 of this chapter and §218.176 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

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### Subpart S—Taking Marine Mammals Incidental to U.S. Navy Mission Activities in the Naval Surface Warfare Center Panama City Division

SOURCE: 75 FR 3410, Jan. 21, 2010, unless otherwise noted.

EFFECTIVE DATE NOTE: At 75 FR 3410, Jan. 21, 2010, §§218.180–218.188 (Subpart S) were added, effective Jan. 21, 2010, through Jan. 21, 2015.

#### §218.180 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the NSWC PCD Study Area, which includes St. Andrew Bay (SAB) and military warning areas (areas within the GOM subject to military operations) W-151 (includes Panama City Operating Area), W-155 (includes Pensacola Operating Area), and W-470, as described in Figures 2-1 and 2-2 of the Navy's application for the Letter of Authorization (LOA). The NSWC PCD Study Area includes a Coastal Test Area, a Very Shallow Water Test Area, and Target and Operational Test Fields. The NSWC PCD Research, Development, Test, and Evaluation (RDT&E) activities may be conducted anywhere within the existing military operating areas and SAB from the mean high water line (average high tide mark) out to 222 km (120 nm) offshore. The locations and environments include:

(1) Test area control sites adjacent to NSWC PCD.

(2) Wide coastal shelf 97 km (52 nm) distance offshore to 183 m (600 ft), including bays and harbors.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources,

or similar sources, for Navy mission activities in territorial waters (estimated amounts below):

(i) AN/SQS-53/56 Kingfisher—up to 15 hours over the course of 5 years (an average of 3 hours per year);

(ii) Sub-bottom profiler (2-9 kHz)—up to 105 hours over the course of 5 years (an average of 21 hours per year);

(iii) REMUS SAS-LF (center frequency 15 kHz)—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(iv) REMUS Modem—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(v) Sub-bottom profiler (2-16 kHz)—up to 120 hours over the course of 5 years (an average of 24 hours per year);

(vi) AN/SQQ-32—up to 150 hours over the course of 5 years (an average of 30 hours per year);

(vii) REMUS-SAS-LF (center frequency 20 kHz)—up to 100 hours over the course of 5 years (an average of 20 hours per year);

(viii) SAS-LF—up to 175 hours over the course of 5 years (an average of 35 hours per year);

(ix) AN/WLD-1 RMS-ACL—up to 168 hours over the course of 5 years (an average of 33.5 hours per year);

(x) BPAUV Sidescan (center frequency 75 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xi) TVSS—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xii) F84Y—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xiii) BPAUV Sidescan (center frequency 102.5 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xiv) REMUS-SAS-HF—up to 50 hours over the course of 5 years (an average of 10 hours per year);

(xv) SAS-HF—up to 58 hours over the course of 5 years (an average of 11.5 hours per year);

(xvi) AN/SQS-20—up to 2725 hours over the course of 5 years (an average of 545 hours per year);

(xvii) AN/WLD-11 RMS Navigation—up to 75 hours over the course of 5 years (an average of 15 hours per year); and

(xviii) BPAUV Sidescan (center frequency 120 kHz)—up to 150 hours over the course of 5 years (an average of 30 hours per year).

(2) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources, or similar sources, for Navy mission activities in non-territorial waters (estimated amounts below):

(i) AN/SQS-53/56 Kingfisher—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(ii) Sub-bottom profiler (2-9 kHz)—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(iii) REMUS Modem—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(iv) Sub-bottom profiler (2-16 kHz)—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(v) AN/SQQ-32—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(vi) SAS-LF—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(vii) AN/WLD-1 RMS-ACL—up to 25 hours over the course of 5 years (an average of 5 hours per year);

(viii) BPAUV Sidescan (center frequency 75 kHz)—up to 190 hours over the course of 5 years (an average of 38 hours per year);

(ix) TVSS—up to 83 hours over the course of 5 years (an average of 16.5 hours per year);

(x) F84Y—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xi) REMUS-SAS-HF—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xii) SAS-HF—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xiii) AN/AQS-20—up to 75 hours over the course of 5 years (an average of 15 hours per year); and

(xiv) BPAUV Sidescan (center frequency 120 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year).

(3) Ordnance operations, or similar operations, for Navy mission activities in territorial waters (estimated amounts below):

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(i) Range 1 (0–10 lb)—up to 255 detonations over the course of 5 years (an average of 51 detonations per year);

(ii) Range 2 (11–75 lb)—up to 15 detonations over the course of 5 years (an average of 3 detonations per year); and

(iii) Line charges—up to 15 detonations over the course of 5 years (an average of 3 detonations per year).

(4) Ordnance operations, or similar operations, for Navy mission activities in non-territorial waters (estimated amounts below):

(i) Range 3 (76–600 lb)—up to 80 detonations over the course of 5 years (an average of 16 detonations per year).

(ii) Reserved.

(5) Projectile firing operations, or similar operations, for Navy mission activities in non-territorial waters (estimated amounts below):

(i) 5 in. Naval gunfire—up to 300 rounds over the course of 5 years (an average of 60 rounds per year);

(ii) 40 mm rounds—up to 2,400 rounds over the course of 5 years (an average of 480 rounds per year);

(iii) 30 mm rounds—up to 3,000 rounds over the course of 5 years (an average of 600 rounds per year);

(iv) 20 mm rounds—up to 14,835 rounds over the course of 5 years (an average of 2,967 rounds per year);

(v) 76 mm rounds—up to 1,200 rounds over the course of 5 years (an average of 240 rounds per year);

(vi) 25 mm rounds—up to 2,625 rounds over the course of 5 years (an average of 525 rounds per year); and

(vii) Small arms—up to 30,000 rounds over the course of 5 years (an average of 6,000 rounds per year).

(d) Amended regulations are effective February 1, 2012, through January 21, 2015.

(e) The taking of marine mammals may be authorized in an LOA for the activities and sources listed in §218.180(c) should the amounts (e.g., hours, number of exercises) vary from those estimated in §218.180(c), provided that the variation does not result in exceeding the amount of take indicated in §218.181(b).

[75 FR 3410, Jan. 21, 2010, as amended at 77 FR 4925, Feb. 1, 2012]

### §218.181 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 218.186 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in §218.180(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in §218.180(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Sperm whale (*Physeter macrocephalus*)—10 (an average of 2 annually),

(ii) Risso's dolphin (*Grampus griseus*)—10 (an average of 2 annually);

(iii) Bottlenose dolphin (*Tursiops truncatus*)—3,070 (an average of 614 annually);

(iv) Atlantic spotted dolphin (*Stenella frontalis*)—2,355 (an average of 471 annually);

(v) Pantropical spotted dolphin (*S. attenuata*)—115 (an average of 23 annually);

(vi) Striped dolphin (*S. coeruleoalba*)—25 (an average of 5 annually);

(vii) Spinner dolphin (*S. longirostris*)—115 (an average of 23 annually);

(viii) Melon-headed whale (*Peponocephala electra*)—10 (an average of 2 annually);

(ix) Short-finned pilot whale (*Globicephala macrorhynchus*)—5 (an average of 1 annually);

(x) Clymene dolphin (*S. clymene*)—25 (an average of 5 annually);

(2) Level A Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*)—10 (an average of 2 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—10 (an average of 2 annually);

(iii) Pantropical spotted dolphin (*S. attenuata*)—5 (an average of 1 annually);

(ix) Spinner dolphin (*S. longirostris*)—5 (an average of 1 annually).

**§218.182 Prohibitions.**

Notwithstanding takings contemplated in §218.181 and authorized by a Letter of Authorization issued under §216.106 of this chapter and §218.186, no person in connection with the activities described in §218.180 may:

- (a) Take any marine mammal not specified in §218.181(b);
- (b) Take any marine mammal specified in §218.181(b) other than by incidental take as specified in §218.181(b)(1) and (2);
- (c) Take a marine mammal specified in §218.181(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or
- (d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under §216.106 of this chapter and §218.186.

**§218.183 Mitigation.**

When conducting RDT&E activities identified in §218.180(c), the mitigation measures contained in this subpart and subsequent Letters of Authorization issued under §§216.106 of this chapter and §218.186 must be implemented. These mitigation measures include, but are not limited to:

(a) *Mitigation Measures for HFAS/MFAS Operations:* (1) Personnel Training: (i) All marine observers onboard platforms involved in NSW PCD RDT&E activities shall complete Marine Species Awareness Training (MSAT).

(ii) Marine observers shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of mitigation measures if marine species are spotted.

(2) Marine Observer Responsibilities:

(i) On the bridge of surface vessels, there shall always be at least one to three marine species awareness trained observer(s) on watch whose duties include observing the water surface around the vessel.

(A) For vessels with length under 65 ft (20 m), there shall always be at least one marine observer on watch.

(B) For vessels with length between 65–200 ft (20–61 m), there shall always be

at least two marine observers on watch.

(C) For vessels with length above 200 ft (61 m), there shall always be at least three marine observers on watch.

(ii) Each marine observer shall have at their disposal at least one set of binoculars available to aid in the detection of marine mammals.

(iii) On surface vessels equipped with AN/SQQ-53C/56, pedestal mounted “Big Eye” (20×110) binoculars shall be present and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(iv) Marine observers shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(v) Marine observers shall scan the water from the vessel to the horizon and be responsible for ensuring that all contacts in their sector follow the below protocols:

(A) In searching the assigned sector, the marine observer shall always start at the forward part of the sector and search aft (toward the back).

(B) To search and scan, the marine observer shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon.

(C) The marine observer shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars.

(D) The marine observer shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view.

(E) At the end of the sector search, the glasses would be lowered to allow the eyes to rest for a few seconds, and then the marine observer shall search back across the sector with the naked eye.

(vi) After sunset and prior to sunrise, marine observers shall employ Night Lookout Techniques in accordance with the Lookout Training Handbook.

(vii) At night, marine observers shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, marine observers shall look a

little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision.

(viii) Marine observers shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Test Director or the Test Director's designee.

(3) Operating Procedures:

(i) The Test Director or the Test Director's designee shall maintain the logs and records documenting RDT&E activities should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a RDT&E mission activity.

(ii) A Record of Environmental Consideration shall be included in the Test Plan prior to the test event to further disseminate the personnel testing requirement and general marine mammal mitigation measures.

(iii) Test Directors shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the vessel.

(iv) All personnel engaged in passive acoustic sonar operation (including aircraft or surface vessels) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the Test Director or the Test Director's designee for dissemination and appropriate action.

(v) During HFAS/MFAS mission activities, personnel shall utilize all available sensor and optical systems (such as Night Vision Goggles) to aid in the detection of marine mammals.

(vi) Navy aircraft participating in RDT&E activities at sea shall conduct and maintain surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(vii) Marine mammal detections shall be immediately reported to the Test Director or the Test Director's designee for further dissemination to vessels in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the vessel will likely result in a closing of

the distance to the detected marine mammal.

(viii) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard marine observer, or acoustically) the Navy will ensure that HFAS/MFAS transmission levels are limited to at least 6 dB below normal operating levels if any detected marine mammals are within 1,000 yards (914 m) of the sonar source (the bow).

(A) Vessels shall continue to limit maximum HFAS/MFAS transmission levels by this 6-dB factor until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(B) The Navy shall ensure that HFAS/MFAS transmissions will be limited to at least 10 dB below the equipment's normal operating level if any detected animals are within 500 yards (457 m) of the sonar source. Vessels will continue to limit maximum ping levels by this 10-dB factor until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(C) The Navy shall ensure that HFAS/MFAS transmissions are ceased if any detected marine mammals are within 200 yards (183 m) of the sonar source. HFAS/MFAS will not resume until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(D) Special conditions applicable for dolphins only: If, after conducting an initial maneuver to avoid close quarters with dolphins, the Officer of the Deck concludes that dolphins are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins continue to exhibit bow wave riding behavior.

(E) If the need for power-down should arise as detailed in "Safety Zones" above, Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (*i.e.*, the first power-down will be to 229

dB, regardless of at what level above 235 sonar was being operated).

(ix) Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

(x) Sonar levels (generally)—Navy shall operate sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet RDT&E objectives.

(b) *Mitigation Measures for Ordnance and Projectile Firing:* (1) No detonations over 34 kg (75 lb) shall be conducted in territorial waters, except the line charge detonation, which is a 107 m (350 ft).

(2) The number of live mine detonations shall be minimized and the smallest amount of explosive material possible to achieve test objectives will be used.

(3) Activities shall be coordinated through the Environmental Help Desk to allow potential concentrations of detonations in a particular area over a short time to be identified and avoided.

(4) Visual surveys and aerial surveys of the clearance zones specified in §218.183(b)(6)(i) through (iii) shall be conducted in accordance with §218.184(c) for all test operations that involve detonation events with large net explosive weight (NEW). Any protected species sighted will be reported.

(5) Line charge tests shall not be conducted during the nighttime.

(6) Additional mitigation measures shall be determined through the NSWC PCD's Environmental Review Process based on test activities including the size of detonations, test platforms, and environmental effects documented in the Navy's EIS/OEIS. Clearance zones must be determined based on the upper limit of different ranges of net explosive weight (NEW) used in the tests, as listed below:

(i) NEW between 76–600 lb: clearance zone is 2,863 m (9,393 ft);

(ii) NEW between 11–75 lb: clearance zone is 997 m (2,865 ft); and

(iii) NEW less than 11 lb—clearance zone is 345 m (1,132 ft).

(c) *Mitigation Measures for Surface Operations:* (1) While underway, vessels shall have at least one to three marine species awareness trained observers

(based on vessel length) with binoculars. As part of their regular duties, marine observers shall watch for and report to the Test Director or Test Director's designee the presence of marine mammals.

(i) For vessels with length under 65 ft (20 m), there shall always be at least one marine observer on watch.

(ii) For vessels with length between 65–200 ft (20–61 m), there shall always be at least two marine observers on watch.

(iii) For vessels with length above 200 ft (61 m), there shall always be at least three marine observers on watch.

(2) Marine observers shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(3) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a “safe speed” (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(4) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and shall implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Actions shall include changing speed and/or direction and are dictated by environmental and other conditions (*e.g.*, safety, weather).

(5) Naval vessels shall maneuver to keep at least 500 yd (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other Navy vessels in the vicinity of the whale.

(6) Where operationally feasible and safe, vessels shall avoid closing to

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within 200-yd (183 m) of marine mammals other than whales.

### § 218.184 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §§ 216.106 and 218.186 for activities described in § 218.180(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.180(c) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified or authorized in § 218.181(b).

(c) The Holder of the Letter of Authorization must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the NSWC PCD Study Area Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Visual Surveys—Vessel, Aerial and Shore-based: The Holder of this Authorization shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

(i) In accordance with all safety considerations, observations shall be maximized by working from all available platforms: Vessels, aircraft, land and/or in combination.

(ii) Vessel and aerial surveys shall be conducted two days before, during, and one to five days after the NSWC PCD mission activities on commercial vessels and aircraft.

(iii) Visual surveys shall be conducted during Navy mission activities that have been identified to provide the highest likelihood of success.

(iv) The visual survey team shall collect the same data that are collected

by Navy marine observers, including but not limited to:

- (A) Location of sighting;
- (B) Species (or to the lowest taxa possible);
- (C) Number of individuals;
- (D) Number of calves present, if any;
- (E) Duration of sighting;
- (F) Behavior of marine animals sighted;
- (G) Direction of travel;
- (H) Environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and

(I) When in relation to Navy exercises did the sighting occur (before, during or after detonations/exercise).

(v) Animal sightings and relative distance from a particular activity site shall be used post survey to estimate the number of marine mammals exposed to different received levels (energy and pressure of discharge based on distance to the source, bathymetry, oceanographic conditions and the type and size of detonation) and their corresponding behavior.

(vi) Any digital photographs that are taken of marine mammals during visual surveys shall be provided to local researchers for their regional research.

(vii) The Holder of the Letter of Authorization shall, when conducting RDT&E activities in the NSWC PCD Study Area, implement the following monitoring methods:

(A) Aerial surveys:

(1) During NSWC PCD sonar related mission activities, an aerial survey team shall fly transects relative to a Navy surface vessel that is conducting the mission activities.

(2) The aerial survey team shall collect both visual sightings and behavioral observations of marine animals.

(3) These transect data shall provide an opportunity to collect data of marine mammals at different received levels and their behavioral responses and movement relative to the Navy vessel's position.

(4) Aerial surveys shall include time with and without test events in order to compare density, geographical distribution and behavioral observations.

(5) Behavioral observation methods shall involve three professionally trained marine mammal observers and a pilot. Two observers shall observe behaviors, one with hand-held binoculars and one with the naked eye.

(6) Detailed behavioral focal observations of cetaceans shall be recorded including the following variables where possible: species (or to the lowest taxa possible), group size and composition (number of calves, etc.), latitude/longitude, surface and dive durations and times, number and spacing/times of respirations, conspicuous behaviors (*e.g.*, breach, tail slap, etc.), behavioral states, orientation and changes in orientation, estimated group travel speed, inter-individual distances, defecation, social interactions, aircraft speed, aircraft altitude, distance to focal group (using the plane's radar) and any unusual behaviors or apparent reactions.

(B) Vessel Surveys:

(1) Vessel surveys shall be designed to maximize detections of any target species near mission activity event for focal follows.

(2) Systematic transects shall be used to locate marine mammals. In the course of conducting these surveys, the vessel(s) shall deviate from transect protocol to collect behavioral data particularly if a Navy vessel is visible on the horizon or closer.

(3) While the Navy vessels are within view, attempts shall be made to position the dedicated survey vessel in the best possible way to obtain focal follow data in the presence of the Navy mission activities. If Navy vessels are not in view, then the vessel shall begin a systematic line transect surveys within the area to assess marine mammal occurrence and observe behavior.

(4) Post-analysis shall focus on how the location, speed and vector of the survey vessel and the location and direction of the sonar source (*e.g.* Navy surface vessel) relates to the animal.

(5) Any other vessels or aircraft observed in the area shall also be documented.

(C) Shore-based Surveys:

(1) Shore-based monitors shall observe explosive events that are planned in advance to occur adjacent to near-shore areas where there are elevated coastal structures (*e.g.* lookout tower

at Eglin Air Force Base) or topography, and shall use binoculars or theodolite to augment other visual survey methods.

(2) Shore-based surveys of the detonation area and nearby beaches shall be conducted for stranded marine animals following nearshore events. If any distressed, injured or stranded animals are observed, an assessment of the animal's condition (alive, injured, dead, or degree of decomposition) shall be reported immediately to the Navy for appropriate action and the information shall be transmitted immediately to NMFS.

(3) If animals are observed prior to or during an explosion, a focal follow of that individual or group shall be conducted to record behavioral responses.

(2) Passive Acoustic Monitoring (PAM): The Holder of this Authorization shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

(i) The Navy shall use towed or over-the-side passive acoustic monitoring device/hydrophone array when feasible in the NSWCD Study Area for PAM.

(ii) The array shall be deployed for each of the days the ship is at sea.

(iii) The array shall be able to detect low frequency vocalizations (less than 1,000 Hz) for baleen whales and relatively high frequency vocalizations (up to 30 kHz) for odontocetes.

(iv) These buoys shall be left in place for a long enough duration (*e.g.* months) that data are collected before, during and outside of mission activities.

(v) Acoustic data collected from the buoys shall be used in order to detect, locate, and potentially track calling whales/dolphins.

(3) Marine Mammal Observers (MMOs) on Navy vessels:

(i) Civilian MMOs aboard Navy vessels shall be used to research the effectiveness of Navy marine observers, as well as for data collection during other monitoring surveys.



(ii) MMOs shall be field-experienced observers that are Navy biologists or contracted observers.

(iii) MMOs shall be placed alongside existing Navy marine observers during a sub-set of RDT&E events.

(iv) MMOs shall inform the Navy marine observer of any marine mammal sighting so that appropriate action may be taken by the chain of command. For less biased data, it is recommended that MMOs schedule their daily observations to duplicate the marine observers' schedule.

(v) MMOs shall monitor for marine mammals from the same height above water as the Navy marine observers (*e.g.* bridge wings) and as all visual survey teams, and they shall collect the same data collected by Navy marine observers, including but not limited to:

- (A) Location of sighting;
- (B) Species;
- (C) Number of individuals;
- (D) Number of calves present, if any;
- (E) Duration of sighting;
- (F) Behavior of marine animals sighted;
- (G) Direction of travel;
- (H) Environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and
- (I) When in relation to Navy RDT&E activities did the sighting occur (before, during or after detonations/exercise).

(d) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy's RDT&E activities utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(e) If there is clear evidence that a marine mammal is injured or killed as a result of the proposed Navy RDT&E

activities (*e.g.*, instances in which it is clear that munitions explosions caused the injury or death) the Naval activities shall be immediately suspended and the situation immediately reported by personnel involved in the activity to the Test Director or the Test Director's designee, who will follow Navy procedures for reporting the incident to NMFS through the Navy's chain-of-command.

(f) Annual NSWC PCD Report—The Navy shall submit a report annually on October 1 describing the RDT&E activities conducted and implementation and results of the NSWC PCD Monitoring Plan (through August 1 of the same year) and RDT&E activities. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the NSWC PCD Monitoring Plan shall, at a minimum, provide the same marine mammal observation data listed below.

- (1) RDT&E Information:
  - (i) Date and time test began and ended;
  - (ii) Location;
  - (iii) Number and types of active sources used in the test;
  - (iv) Number and types of vessels, aircraft, etc., participated in the test;
  - (v) Number and types of underwater detonations;
  - (vi) Total hours of observation effort (including observation time when sonar was not operating).
  - (vii) Total hours of all active sonar source operation;
  - (viii) Total hours of each active sonar source; and
  - (ix) Wave height (high, low, and average during the test) in feet.
- (2) Individual Marine Mammal Sighting Info:
  - (i) Location of sighting;
  - (ii) Species;
  - (iii) Number of individuals;
  - (iv) Calves observed (y/n);
  - (v) Initial detection sensor;
  - (vi) Indication of specific type of platform observation made from;
  - (vii) Length of time observers maintained visual contact with marine mammal(s);
  - (viii) Wave height (in feet);
  - (ix) Visibility;
  - (x) Sonar source in use (y/n);

(xi) Indication of whether animal is <200 yd, 200–500 yd, 500–1,000 yd, 1,000–2,000 yd, or >2,000 yd from sonar source above;

(xii) Mitigation implementation—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was;

(xiii) If the active MFAS in use is hullmounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel);

(xiv) Observed behavior—Marine observers shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.); and

(xv) An evaluation of the effectiveness of mitigation measures designed to avoid exposing marine mammals to HFAS/MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(g) NSWC PCD Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during sonar operations and underwater explosive events for which individual reports are required in §218.184 (d-f). This report will be submitted at the end of the fourth year of the rule (December 2013), covering activities that have occurred through July 1, 2013.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the NSWC PCD Comprehensive Report and the Annual NSWC PCD Report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results

and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

#### **§218.185 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by §216.103 of this chapter) conducting the activity identified in §218.180(c) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with §218.186 or a renewal under §218.187.

#### **§218.186 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the periods of validity of this subpart, but may be renewed or modified sooner subject to the renewal conditions in §218.187 and the modification conditions in §218.188.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

[75 FR 3410, Jan. 21, 2010, as amended at 77 FR 4926, Feb. 1, 2012]

#### **§218.187 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under §216.106 of this chapter and §218.186 for the activity identified in §218.180(c) will be renewed upon:

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(1) Notification to NMFS that the activity described in the application submitted under §218.185 will be undertaken and that there will not be a substantial modification to the desired work, mitigation, or monitoring undertaken during the upcoming period of validity;

(2) Timely receipt of the monitoring reports required under §218.184(b); and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §218.183 and the Letter of Authorization issued under §216.106 of this chapter and §218.186, were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§216.106 of this chapter and 218.187 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either

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from NSW PCD Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§218.184(i)).

(3) Compiled results of Navy-funded research and development (R&D) studies.

(4) Results from specific stranding investigations (either from the NSW PCD Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

[75 FR 3410, Jan. 21, 2010, as amended at 77 FR 4926, Feb. 1, 2012]

### §218.188 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §216.106 of this chapter and §218.186 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under §218.187, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §218.181(b), a Letter of Authorization issued pursuant to §216.106 of this chapter and §218.186 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days subsequent to the action.

### Subparts T–W [Reserved]

**Subpart X—Taking and Importing  
of Marine Mammals; Navy  
Operations of Surveillance  
Towed Array Sensor System  
Low Frequency Active  
(SURTASS LFA) Sonar**

SOURCE: 77 FR 50316, Aug. 20, 2012, unless otherwise noted.

EFFECTIVE DATE NOTE: At 77 FR 50316, Aug. 20, 2012, subpart X was added, effective Aug. 15, 2012, through Aug. 15, 2017.

**§ 218.230 Specified activity, level of taking, and species.**

Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by the U.S. Navy, Department of Defense, while engaged in the operation of no more than four SURTASS LFA sonar systems conducting active sonar operations in areas specified in paragraph (a) of this section. The authorized activities, as specified in a Letter of Authorization issued under §§ 216.106 and 218.238, include the transmission of low frequency sounds from the SURTASS LFA sonar system and the transmission of high frequency sounds from the mitigation sonar described in § 218.234 during routine training and testing as well as during military operations.

(a) The incidental take, by Level A and Level B harassment, of marine mammals from the activity identified in this section may be authorized in certain areas of the Pacific, Atlantic, and Indian Oceans and the Mediterranean Sea, as specified in a Letter of Authorization.

(b) The incidental take, by Level A and Level B harassment, of marine mammals from the activity identified in this section is limited to the following species and species groups:

(1) *Mysticetes*—blue whale (*Balaenoptera musculus*), bowhead whale (*Balaena mysticetus*), Bryde's whale (*Balaenoptera edeni*), fin whale (*Balaenoptera physalus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), North Atlantic right whale (*Eubalaena glacialis*), North Pacific right whale (*Eubalaena ja-*

*ponica*), pygmy right whale (*Caperamarginata*), sei whale (*Balaenoptera borealis*), southern right whale (*Eubalaena australis*),

(2) *Odontocetes*—Andrew's beaked whale (*Mesoplodon bowdoini*), Arnoux's beaked whale (*Berardius arnuxii*), Atlantic spotted dolphin (*Stenella frontalis*), Atlantic white-sided dolphin (*Lagenorhynchus acutus*), Baird's beaked whale (*Berardius bairdii*), Beluga whale (*Dephinapterus leucas*), Blainville's beaked whale (*Mesoplodon densirostris*), Chilean dolphin (*Cephalorhynchus eutropia*), Clymene dolphin (*Stenella clymene*), Commerson's dolphin (*Cephalorhynchus commersonii*), common bottlenose dolphin (*Tursiops truncatus*), Cuvier's beaked whale (*Ziphius cavirostris*), Dall's porpoise (*Phocoenoides dalli*), Dusky dolphin (*Lagenorhynchus obscurus*), dwarf sperm and pygmy sperm whales (*Kogia simus* and *K. breviceps*), false killer whale (*Pseudorca crassidens*), Fraser's dolphin (*Lagenodelphis hosei*), Gervais' beaked whale (*Mesoplodon europaeus*), ginkgo-toothed beaked whale (*Mesoplodon ginkgodens*), Gray's beaked whale (*Mesoplodon grayi*), Heaviside's dolphin (*Cephalorhynchus heavisidii*), Hector's beaked whale (*Mesoplodon hectori*), Hector's dolphin (*Cephalorhynchus hectori*), Hourglass dolphin (*Lagenorhynchus cruciger*), Hubbs' beaked whale (*Mesoplodon carhubbsi*), harbor porpoise (*Phocoena phocoena*), Indo-Pacific bottlenose dolphin (*Tursiops aduncus*), killer whale (*Orca orcinus*), long-beaked common dolphin (*Delphinus capensis*), long-finned pilot whale (*Globicephalamelas*), Longman's beaked whale (*Indopacetus pacificus*), melon-headed whale (*Peponocephala electra*), northern bottlenose whale (*Hyperodon ampullatus*), northern right whale dolphin (*Lissodelphis borealis*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), pantropical spotted dolphin (*Stenella attenuata*), Peale's dolphin (*Lagenorhynchus australis*), Perrin's beaked whale (*Mesoplodon perrini*), pygmy beaked whale (*Mesoplodon peruvianus*), pygmy killer whale (*Feresa attenuata*), Risso's dolphin (*Grampus griseus*), rough-toothed dolphin (*Steno bredanensis*), Shepherd's beaked whale (*Tasmacetus shepardi*),

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short-beaked common dolphin (*Delphinus delphis*), short-finned pilot whale (*Globicephala macrorhynchus*), southern bottlenose whale (*Hyperodon planifrons*), southern right whale dolphin (*Lissodelphis peronii*), Sowerby's beaked whale (*Mesoplodon bidens*), spade-toothed beaked whale (*Mesoplodon traversii*), spectacled porpoise (*Phocoena dioptrica*), sperm whale (*Physeter macrocephalus*), spinner dolphin (*Stenella longirostris*), Stejneger's beaked whale (*Mesoplodon stejnegeri*), strap-toothed beaked whale (*Mesoplodon layardii*), striped dolphin (*Stenella coeruleoalba*), True's beaked whale (*Mesoplodon mirus*), white-beaked dolphin (*Lagenorhynchus albirostris*),

(3) Pinnipeds—Australian sea lion (*Neophoca cinerea*), California sea lion (*Zalophus californianus*), Galapagos fur seal (*Arctocephalus galapagoensis*), Galapagos sea lion (*Zalophus wolfebaeki*), gray seal (*Halichoerus grypus*), Guadalupe fur seal (*Arctocephalus townsendi*), harbor seal (*Phoca vitulina*), harp seal (*Pagophilus groenlandicus*), Hawaiian monk seal (*Monachus schauinslandi*), hooded seal (*Cystophora cristata*), Juan Fernandez fur seal (*Arctocephalus philippi*), Mediterranean monk seal (*Monachus monachus*), New Zealand fur seal (*Arctocephalus forsteri*), New Zealand fur seal (*Phocarctos hookeri*), northern elephant seal (*Mirounga angustirostris*), northern fur seal (*Callorhinus ursinus*), ribbon seal (*Phoca fasciata*), South African and Australian fur seals (*Arctocephalus pusillus*), South American fur seal (*Arctocephalus australis*), South American sea lion (*Otaria flavescens*), southern elephant seal (*Mirounga leonina*), spotted seal (*Phoca largha*), Steller sea lion (*Eumetopias jubatus*), subantarctic fur seal (*Arctocephalus tropicalis*).

### §218.231 Effective dates.

Regulations are effective August 15, 2012 through August 15, 2017.

### §218.232 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§216.106 and 218.238 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by Level A and Level B har-

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assment within the areas described in §218.230(a), provided that the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The Holder of the Letter of Authorization must conduct the activities identified in §218.230 in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in §218.230 is limited to the species listed in §218.230(b) by the method of take indicated in paragraphs (c)(2) through (5) of this section.

(1) The Navy must maintain a running calculation/estimation of takes of each species over the effective period of these regulations.

(2) Level B harassment will not exceed 12 percent of any marine mammal stock listed in §218.230(b)(1) through (3) annually over the course of the five-year regulations. This annual per-stock cap of 12 percent applies regardless of the number of SURTASS LFA sonar vessels operating.

(3) Level A harassment of no more than six mysticetes (total), of any of the species listed in §218.230(b)(1) over the course of the five-year regulations.

(4) Level A harassment of no more than 25 odontocetes (total), of any of the species listed in §218.230(b)(2) over the course of the five-year regulations.

(5) Level A harassment of no more than 25 pinnipeds (total), of any of the species listed in §218.230(b)(3) over the course of the five-year regulations.

### §218.233 Prohibitions.

No person in connection with the activities described in §218.230 may:

(a) Take any marine mammal not specified in §218.230(b);

(b) Take any marine mammal specified in §218.230 other than by incidental take as specified in §218.232(c)(2) through (5);

(c) Take any marine mammal specified in §218.230 if NMFS makes a determination that such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, any of the terms, conditions, or requirements of these regulations or a Letter of Authorization issued under §§216.106 and 218.238 of this chapter.

#### §218.234 Mitigation.

When conducting operations identified in §218.230, the mitigation measures described in this section and in any Letter of Authorization issued under §§216.106 and 218.238 must be implemented.

(a) *Personnel Training—Lookouts:* (1) The Navy shall train the lookouts in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of protective measures if they spot marine mammals.

(2) The Navy will hire one or more marine mammal biologists qualified in conducting at-sea marine mammal visual monitoring from surface vessels to train and qualify designated ship personnel to conduct at-sea visual monitoring.

(b) *General Operating Procedures:* (1) Prior to SURTASS LFA sonar operations, the Navy will promulgate executive guidance for the administration, execution, and compliance with these regulations and any Letters of Authorization issued.

(2) The Holder of a Letter of Authorization will not transmit the SURTASS LFA sonar signal at a frequency greater than 500 Hertz (Hz).

(c) *LFA Sonar Mitigation Zone and 1-km Buffer Zone; Suspension and Delay:*

(1) Prior to commencing and during SURTASS LFA sonar transmissions, the Holder of a Letter of Authorization will determine the propagation of LFA sonar signals in the ocean and the distance from the SURTASS LFA sonar source to the 180-decibel (dB) re: 1  $\mu$ Pa isopleth.

(2) The Holder of a Letter of Authorization will establish a 180-dB LFA sonar mitigation zone around the surveillance vessel that is equal in size to the 180-dB re: 1  $\mu$ Pa isopleth (i.e., the volume subjected to sound pressure levels of 180 dB or greater) as well as a one-kilometer (1-km) buffer zone around the LFA sonar mitigation zone.

(3) If a marine mammal is detected, through monitoring required under §218.235, within or about to enter the LFA sonar mitigation zone plus the 1-km buffer zone, the Holder of the Letter of Authorization will immediately delay or suspend SURTASS LFA sonar transmissions.

(d) *Resumption of SURTASS LFA sonar transmissions:* (1) The Holder of a Letter of Authorization will not resume SURTASS LFA sonar transmissions earlier than 15 minutes after:

(i) All marine mammals have left the area of the SURTASS LFA sonar mitigation and buffer zones; and

(ii) There is no further detection of any marine mammal within the LFA sonar mitigation and buffer zones as determined by the visual, passive, and high frequency monitoring described in §218.235.

(e) *Ramp-up Procedures for the high-frequency marine mammal monitoring (HF/M3) sonar required under §218.235:*

(1) The Holder of a Letter of Authorization will ramp up the HF/M3 sonar power level beginning at a maximum source sound pressure level of 180 dB re: 1  $\mu$ Pa at 1 meter in 10-dB increments to operating levels over a period of no less than five minutes:

(i) At least 30 minutes prior to any SURTASS LFA sonar transmissions;

(ii) Prior to any SURTASS LFA sonar calibrations or testing that are not part of regular SURTASS LFA sonar transmissions described in §218.230; and

(iii) Anytime after the HF/M3 active sonar source has been powered down for more than two minutes.

(2) The Holder of a Letter of Authorization will not increase the HF/M3 active sonar system's sound pressure level once a marine mammal is detected; ramp-up may resume once marine mammals are no longer detected.

(f) *Geographic Restrictions on the SURTASS LFA Sonar Sound Field:* (1) The Holder of a Letter of Authorization will not operate the SURTASS LFA sonar such that:

(i) The SURTASS LFA sonar sound field exceeds 180 dB re: 1  $\mu$ Pa (rms) at a distance less than 12 nautical miles (nm) (22 kilometers (km)) from any coastline, including offshore islands;

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(ii) The SURTASS LFA sonar sound field exceeds 180 dB re: 1 µPa (rms) at a distance less than 1 km (0.5 nm) seaward of the outer perimeter of any offshore biologically important area designated in § 218.234(f)(2) during the period specified.

(2) The Offshore Biologically Important Areas (OBIA) for marine mammals (with specified periods) for SURTASS LFA sonar operations are the following:

Name of area	Location of area	Months of importance
(i) Georges Bank .....	40°00' N, 72°30' W; 39°37' N, 72°09' W; 39°54' N, 71°43' W; 40°02' N, 71°20' W; 40°08' N, 71°01' W; 40°04' N, 70°44' W; 40°00' N, 69°24' W; 40°16' N, 68°27' W; 40°34' N, 67°13' W; 41°00' N, 66°24' W; 41°52' N, 65°47' W; 42°20' N, 66°06' W; 42°18' N, 67°23' W.	Year-round.
(ii) Roseway Basin Right Whale Conservation Area.	43°05' N, 65°40' W; 43°05' N, 65°03' W; 42°45' N, 65°40' W; 42°45' N, 65°03' W.	June through December, annually.
(iii) Great South Channel, U.S. Gulf of Maine, and Stellwagen Bank National Marine Sanctuary (NMS).	41°00.000' N, 69°05.000' W; 42°09.000' N, 67°08.400' W; 42°53.436' N, 67°43.873' W; 44°12.541' N, 67°16.847' W; 44°14.911' N, 67°08.936' W; 44°21.538' N, 67°03.663' W; 44°26.736' N, 67°09.596' W; 44°16.805' N, 67°27.394' W; 44°11.118' N, 67°56.398' W; 43°59.240' N, 68°08.263' W; 43°36.800' N, 68°46.496' W; 43°33.925' N, 69°19.455' W; 43°32.008' N, 69°44.504' W; 43°21.922' N, 70°06.257' W; 43°04.084' N, 70°21.418' W; 42°51.982' N, 70°31.965' W; 42°45.187' N, 70°23.396' W; 42°39.068' N, 70°30.188' W; 42°32.892' N, 70°35.873' W; 42°07.748' N, 70°28.257' W; 42°05.592' N, 70°02.136' W; 42°03.664' N, 69°44.000' W; 41°40.000' N, 69°45.000' W.	January 1 to November 14, annually.
(iv) Southeastern U.S. Right Whale Seasonal Habitat.	Critical Habitat Boundaries are coastal waters between 31°15' N and 30°15' N from the coast out 15 nautical miles (nmi); and the coastal waters between 30°15' N and 28°00' N from the coast out 5 nmi. (50 CFR § 226.13(c)); OBIA Boundaries are coastal waters between 31°15' N and 30°15' N from 12 to 15 nmi..	November 15 to April 15, annually.
(v) North Pacific Right Whale Critical Habitat.	57°03' N, 153°00' W; 57°18' N, 151°30' W; 57°00' N, 151°30' W; 56°45' N, 153°00' W. (50 CFR § 226.215).	March through August, annually.
(vi) Silver Bank and Navidad Bank .....	Silver Bank: ..... 20°38.899' N, 69°23.640' W; 20°55.706' N, 69°57.984' W; 20°25.221' N, 70°00.387' W; 20°12.833' N, 69°40.604' W; 20°13.918' N, 69°31.518' W; 20°28.680' N, 69°31.900' W. Navidad Bank: 20°15.596' N, 68°47.967' W; 20°11.971' N, 68°54.810' W; 19°52.514' N, 69°00.443' W; 19°54.957' N, 68°51.430' W; 19°51.513' N, 68°41.399' W.	December through April, annually.
(vii) Coastal waters of Gabon, Congo and Equatorial Guinea.	An exclusion zone following the 500-m isobath extending from 3°31.055' N, 9°12.226' E in the north offshore of Malabo southward to 8°57.470' S, 12°55.873' E offshore of Luanda	June through October, annually.
(viii) Patagonian Shelf Break .....	Between 200- and 2000-m isobaths and the following latitudes: 35°00' S, 39°00' S, 40°40' S, 42°30' S, 46°00' S, 48°50' S..	Year-round.

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Name of area	Location of area	Months of importance
(ix) Southern Right Whale Seasonal Habitat.	Coastal waters between 42°00" S and 43°00" S from 12 to 15 nm including the enclosed bays of Golfo Nuevo, Golfo San Jose, and San Matias. Golfos San Jose and San Nuevo are within 22 km (14 mi; 12 nm) coastal exclusion zone	May through December, annually.
(x) Central California National Marine Sanctuaries.	Single stratum boundary created from the Cordell Bank (15 CFR 922.10), Gulf of the Farallones (15 CFR 922.80), and Monterey Bay (15 CFR 922.30) NMS legal boundaries. Monterey Bay NMS includes the Davidson Seamount Management Zone	June through November, annually.
(xi) Antarctic Convergence Zone .....	30° E to 80° E, 45° S; 80° E to 150° E, 55° S; 150° E to 50° W, 60° S; 50° W to 30° E, 50° S.	October through March, annually.
(xii) Piltun and Chayvo offshore feeding grounds in the Sea of Okhotsk.	54°09.436' N, 143°47.408' W; 54°09.436' N, 143°17.354' W; 54°01.161' N, 143°17.354' W; 53°53.580' N, 143°13.398' W; 53°26.963' N, 143°28.230' W; 53°07.013' N, 143°35.481' W; 52°48.705' N, 143°38.447' W; 52°32.077' N, 143°37.788' W; 52°21.605' N, 143°34.163' W; 52°09.470' N, 143°26.582' W; 51°57.686' N, 143°30.208' W; 51°36.033' N, 143°42.794' W; 51°08.082' N, 143°51.301' W; 51°08.082' N, 144°16.742' W; 51°24.514' N, 144°11.139' W; 51°48.116' N, 144°10.809' W; 52°03.194' N, 144°20.363' W; 52°23.235' N, 144°10.150' W; 52°28.674' N, 144°12.787' W; 52°42.523' N, 144°10.150' W; 53°12.972' N, 143°55.648' W; 53°18.505' N, 143°56.637' W; 53°23.041' N, 143°53.011' W; 53°28.250' N, 143°53.341' W; 53°44.039' N, 143°49.056' W; 53°53.207' N, 143°50.045' W; 53°59.819' N, 143°48.067' W.	June through November, annually.
(xiii) Coastal waters off Madagascar .....	16°03'55.04" S, 50°27'12.59" E; 16°12'23.03" S, 51°03'37.38" E; 24°30'45.06" S, 48°26'00.94" E; 24°15'28.07" S, 47°46'51.16" E; 22°18'00.74" S, 48°14'13.52" E; 20°52'24.12" S, 48°43'13.49" E; 19°22'33.24" S, 49°15'45.47" E; 18°29'46.08" S, 49°37'32.25" E; 17°38'27.89" S, 49°44'27.17" E; 17°24'39.12" S, 49°39'17.03" E; 17°19'35.34" S, 49°54'23.82" E; 16°45'41.71" S, 50°15'56.35" E.	July through September, annually for humpback whale breeding and November through December, annually for migrating blue whales.
(xiv) Madagascar Plateau, Madagascar Ridge, and Walters Shoal.	25°55'20.00" S, 44°05'15.45" E; 25°46'31.36" S, 47°22'35.90" E; 27°02'37.71" S, 48°03'31.08" E; 35°13'51.37" S, 46°26'19.98" E; 35°14'28.59" S, 42°35'49.20" E; 31°36'57.96" S, 42°37'49.35" E; 27°41'11.21" S, 44°30'11.01" E.	November through December, annually.



Name of area	Location of area	Months of importance
(xv) Ligurian-Corsican-Provencal Basin and Western Pelagos Sanctuary in the Mediterranean Sea.	42°50.271' N, 06°31.883' E; 42°55.603' N, 06°43.418' E; 43°04.374' N, 06°52.165' E; 43°12.600' N, 07°10.440' E; 43°21.720' N, 07°19.380' E; 43°30.600' N, 07°32.220' E; 43°33.900' N, 07°49.920' E; 43°36.420' N, 08°05.580' E; 43°42.600' N, 08°22.140' E; 43°50.880' N, 08°34.500' E; 43°58.560' N, 08°47.700' E; 43°59.040' N, 08°56.040' E; 43°57.047' N, 09°03.540' E; 43°52.260' N, 09°08.520' E; 43°47.580' N, 09°13.500' E; 43°36.060' N, 09°16.620' E; 43°28.440' N, 09°05.820' E; 43°21.360' N, 09°02.100' E; 43°16.020' N, 08°57.240' E; 43°04.440' N, 08°47.580' E; 42°54.900' N, 08°35.400' E; 42°45.900' N, 08°27.540' E; 42°36.060' N, 08°22.020' E; 42°22.620' N, 08°15.849' E; 42°07.202' N, 08°17.174' E; 41°52.800' N, 08°15.720' E; 41°39.780' N, 08°05.280' E; 41°28.200' N, 08°51.600' E; 42°57.060' N, 06°19.860' E.	July to August, annually.
(xvi) Hawaiian Islands Humpback Whale NMS and Penguin Bank.	21°10'02.179" N, 157°30'58.217" W; 21°09'46.815" N, 157°30'22.367" W; 21°06'39.882" N, 157°31'00.778" W; 21°02'51.976" N, 157°30'30.049" W; 20°59'52.725" N, 157°29'28.591" W; 20°58'05.174" N, 157°27'35.919" W; 20°55'49.456" N, 157°30'58.217" W; 20°50'44.729" N, 157°42'42.418" W; 20°51'02.654" N, 157°44'45.333" W; 20°53'56.784" N, 157°46'04.716" W; 20°56'32.988" N, 157°45'33.987" W; 21°01'27.472" N, 157°43'10.586" W; 21°05'20.499" N, 157°39'27.802" W; 21°10'02.179" N, 157°30'58.217" W.	November through April, annually.
(xvii) Costa Rica Dome .....	Centered at 9° N and 88° W .....	Year-round.
(xviii) Great Barrier Reef Between 16° S and 21° S.	16°01.829' S, 145°38.783' E; 15°52.215' S, 146°20.936" E; 17°28.354" S, 146°59.392" E; 20°16.228" S, 151°39.674" E; 20°58.381" S, 150°30.897" E; 20°17.007" S, 149°38.247" E; 20°10.941" S, 149°18.247" E; 20°02.403" S, 149°12.623" E; 19°53.287" S, 149°03.986" E; 19°49.866" S, 148°52.135" E; 19°53.287" S, 148°44.302" E; 19°47.965" S, 148°36.870" E; 19°47.205" S, 148°26.024" E; 19°19.978" S, 147°39.626" E; 19°14.065" S, 147°37.014" E; 19°08.913" S, 147°31.993" E; 19°05.667" S, 147°24.160" E; 19°07.576" S, 147°18.134" E; 18°51.718" S, 146°51.219" E; 18°44.258" S, 146°54.031" E; 18°37.175" S, 146°51.420" E; 18°31.620" S, 146°43.385" E; 18°27.595" S, 146°40.573" E; 17°36.676" S, 146°20.488" E; 17°20.484" S, 146°16.671" E; 17°07.745" S, 146°13.056" E; 16°49.769" S, 146°11.047" E; 16°41.835" S, 146°03.817" E; 16°39.706" S, 145°54.979" E.	May through September, annually.
(xix) Bonney Upwelling on the south coast of Australia.	37°12'20.036" S, 139°31'17.703" E; 37°37'33.815" S, 139°42'42.508" E; 38°10'36.144" S, 140°22'57.345" E; 38°44'50.558" S, 141°33'50.342" E; 39°07'04.125" S, 141°11'00.733" E; 37°28'33.179" S, 139°10'52.263" E.	December through May, annually.

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Name of area	Location of area	Months of importance
(xx) Northern Bay of Bengal and Head of Swatch-of-No-Ground.	20°59.735' N, 89°07.675' E; 20°55.494' N, 89°09.484' E; 20°52.883' N, 89°12.704' E; 20°55.275' N, 89°18.133' E; 21°04.558' N, 89°25.294' E; 21°12.655' N, 89°25.354' E; 21°13.279' N, 89°16.833' E; 21°06.347' N, 89°15.011' E.	Year-round.
(xxi) Olympic Coast NMS and Prairie, Barkley Canyon, and Nitnat Canyon.	Boundaries within 23 nm (26.5 m; 42.6 km) of the coast from 47°07' N to 48°30' N latitude. 48°30'01.995" N, 125°58'38.786" W; 48°16'55.605" N, 125°38'52.052" W; 48°23'07.353" N, 125°17'10.935" W; 48°12'38.241" N, 125°16'42.339" W; 47°58'20.361" N, 125°31'14.517" W; 47°58'20.361" N, 126°06'16.322" W; 48°09'46.665" N, 126°25'48.758" W.	Olympic NMS: December, January, March, and May, annually. The Prairie, Barkley Canyon, and Nitnat Canyon: June through September, annually.
(xxii) Abrolhos Bank .....	16°35'34.909" N, 126°52'30.455" W; 16°35'31.619" N, 126°43'41.069" W; 37°23'52.492" N, 126°40'00.131" W; 37°23'52.446" N, 126°30'59.069" W; 39°33'38.351" N, 126°30'59.974" W; 39°30'33.03" N, 126°20'24.752" W; 39°30'33.03" N, 126°18'52.16884" W; 39°32'31.789" N, 126°18'45'09.937" W; 39°32'27.709" N, 126°18'30'59.345" W; 39°30'59.669" N, 126°18'27'28.985" W; 39°30'13.453" N, 126°18'17'30.429" W; 39°26'21.073" N, 126°18'07'43.518" W; 39°19'52.924" N, 126°18'09'24.931" W; 39°16'24.913" N, 126°18'10'04.585" W; 39°12'30.425" N, 126°18'10'20.682" W; 38°39'06.185" N, 126°18'08'50.404" W; 38°35'00.059" N, 126°18'06'05.466" W; 38°31'41.385" N, 126°18'02'09.399" W; 38°29'26.179" N, 126°17'58'01.372" W; 38°28'45.409" N, 126°17'53'58.883" W; 38°29'34.612" N, 126°16'48'58.768" W; 38°55'23.768" N, 126°16'43'15.682" W; 38°53'40.007" N, 126°16'43'15.682" W.	August through November, annually.

(g) *Operational Exception for the SURTASS LFA Sonar Sound Field.* During military operations SURTASS LFA sonar transmissions may exceed 180 dB re: 1  $\mu$ Pa (rms) within the boundaries of a SURTASS LFA sonar OBIA when: operationally necessary to continue tracking an existing underwater contact; or operationally necessary to detect a new underwater contact within the OBIA. This exception does not apply to routine training and testing with the SURTASS LFA sonar systems.

**§ 218.235 Requirements for monitoring.**

(a) The Holder of a Letter of Authorization issued pursuant to §§ 216.106 and 218.238 must:

(1) Conduct visual monitoring from the ship's bridge during daylight hours (30 minutes before sunrise until 30 minutes after sunset) during operations that employ SURTASS LFA sonar in

the active mode. The SURTASS vessels shall have lookouts to maintain a top-side watch with standard binoculars (7x) and with the naked eye.

(2) Use low frequency passive SURTASS sonar to listen for vocalizing marine mammals; and

(3) Use the HF/M3 active sonar to locate and track marine mammals in relation to the SURTASS LFA sonar vessel and the sound field produced by the SURTASS LFA sonar source array, subject to the ramp-up requirements in § 216.234(e).

(b) Monitoring under paragraph (a) of this section must:

(1) Commence at least 30 minutes before the first SURTASS LFA sonar transmission;

(2) Continue between transmission pings; and

(3) Continue either for at least 15 minutes after completion of the

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SURTASS LFA sonar transmission exercise or, if marine mammals are exhibiting unusual changes in behavioral patterns, for a period of time until behavior patterns return to normal or conditions prevent continued observations.

(c) Holders of Letters of Authorization for activities described in § 218.230 are required to cooperate with the National Marine Fisheries Service and any other federal agency for monitoring the impacts of the activity on marine mammals.

(d) Holders of Letters of Authorization must designate qualified on-site individuals to conduct the mitigation, monitoring and reporting activities specified in the Letter of Authorization.

(e) Holders of Letters of Authorization will continue to assess data from the Marine Mammal Monitoring Program and work toward making some portion of that data, after appropriate security reviews, available to scientists with appropriate clearances. Any portions of the analyses conducted by these scientists based on these data that are determined to be unclassified after appropriate security reviews will be made publically available.

(f) Holders of Letters of Authorization will continue to explore the feasibility of coordinating with other fleet assets and/or range monitoring programs to include the use of SURTASS towed horizontal line arrays to augment the collection of marine mammal vocalizations before, during, and after designated exercises.

(g) Holders of Letters of Authorization will collect ambient noise data and will explore the feasibility of declassifying and archiving the ambient noise data for incorporation into appropriate ocean noise budget efforts.

(h) Holders of Letters of Authorization will convene a Scientific Advisory Group (SAG) to analyze different types of monitoring/research that could increase the understanding of the potential effects of low-frequency active sonar transmissions on beaked whales and/or harbor porpoises.

(i) Holders of Letters of Authorization must conduct all monitoring required under the Letter of Authorization.

### § 218.236 Requirements for reporting.

(a) The Holder of the Letter of Authorization must submit classified and unclassified quarterly mission reports to the Director, Office of Protected Resources, NMFS, no later than 30 days after the end of each quarter beginning on the date of effectiveness of a Letter of Authorization or as specified in the appropriate Letter of Authorization. Each quarterly mission report will include all active-mode missions completed during that quarter. At a minimum, each classified mission report must contain the following information:

(1) Dates, times, and location of each vessel during each mission;

(2) Information on sonar transmissions during each mission;

(3) Results of the marine mammal monitoring program specified in the Letter of Authorization; and

(4) Estimates of the percentages of marine mammal species and stocks affected (both for the quarter and cumulatively for the year) covered by the Letter of Authorization.

(b) The Holder of a Letter of Authorization must submit an unclassified annual report to the Director, Office of Protected Resources, NMFS, no later than 45 days after the expiration of a Letter of Authorization. The reports must contain all the information required by the Letter of Authorization.

(c) A final comprehensive report must be submitted to the Director, Office of Protected Resources, NMFS, at least 240 days prior to expiration of these regulations. In addition to containing all the information required by any final year Letter of Authorization, this report must contain an unclassified analysis of new passive sonar technologies and an assessment of whether such a system is feasible as an alternative to SURTASS LFA sonar.

(d) The Navy will continue to assess the data collected by its undersea arrays and work toward making some portion of that data, after appropriate security reviews, available to scientists with appropriate clearances. Any portions of the analyses conducted by these scientists based on these data that are determined to be unclassified after appropriate security reviews will be made publically available. The Navy

will provide a status update to NMFS when they submit their annual application.

(e) Following the Scientific Advisory Group's (SAG) submission of findings, and assuming the SAG recommends going forward with beaked whale and/or harbor porpoise monitoring/research, the Navy will either:

(1) Draft a plan of action outlining their strategy for implementing the SAG's recommendations; or

(2) Describe in writing why none of the SAG's recommendations are feasible and meet with NMFS to discuss any other potential options.

**§218.237 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Navy authority conducting the activity identified in §218.230 must apply for and obtain a Letter of Authorization in accordance with §216.106.

(b) The application for a Letter of Authorization must be submitted to the Director, Office of Protected Resources, NMFS, at least 60 days before the date that either the vessel is scheduled to begin conducting SURTASS LFA sonar operations or the previous Letter of Authorization is scheduled to expire.

(c) All applications for a Letter of Authorization must include the following information:

(1) The date(s), duration, and the area(s) where the vessel's activity will occur;

(2) The species and/or stock(s) of marine mammals likely to be found within each area;

(3) The type of incidental taking authorization requested (i.e., take by Level A and/or Level B harassment);

(4) The estimated percentage and numbers of marine mammal species/stocks potentially affected in each area for the period of effectiveness of the Letter of Authorization; and

(5) The means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on marine mammal populations.

(d) The National Marine Fisheries Service will review an application for a Letter of Authorization in accordance with §216.104(b) and, if adequate and complete, issue a Letter of Authorization.

**§218.238 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed one year, but may be renewed annually subject to renewal conditions in §218.239.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Authorized geographic areas for incidental takings;

(3) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking, their habitat, and the availability of the species for subsistence uses; and

(4) Requirements for monitoring and reporting incidental take.

(c) Issuance of a letter of authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(d) Notice of issuance or denial of an application for a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

**§218.239 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued for the activity identified in §218.230 may be renewed upon:

(1) Notification to NMFS that the activity described in the application submitted under §218.237 will be undertaken and that there will not be a substantial modification to the described activity, mitigation or monitoring undertaken during the upcoming period;

(2) Notification to NMFS of the information identified in §218.237(c);

(3) Timely receipt of the monitoring reports required under §218.236, which have been reviewed by NMFS and determined to be acceptable;

(4) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§218.234,

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218.235, and 218.236 and the previous Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and

(5) A determination by NMFS that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) If a request for a renewal of a Letter of Authorization indicates that a substantial modification to the described work, mitigation, or monitoring will occur, or if NMFS proposes a substantial modification to the Letter of Authorization, NMFS will provide a period of 30 days for public review and comment on the proposed modification. Amending the areas for upcoming SURTASS LFA sonar operations is not considered a substantial modification to the Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

## § 218.240 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantial modification (including withdrawal or suspension) to a Letter of Authorization subject to the provisions of this subpart shall be made by NMFS until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization, without modification, except for the period of validity and a listing of planned operating areas, or for moving the authorized SURTASS LFA sonar system from one ship to another, is not considered a substantial modification.

(b) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.230(b)(1), (2), or (3), NMFS may modify a Letter of Authorization without prior notice and opportunity for public comment. Notification will be published in the FEDERAL REGISTER within 30 days of the action.

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## § 218.241 Adaptive management.

NMFS may modify (including through addition or deletion) or augment the existing mitigation or monitoring measures (after consulting with the Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. NMFS will provide a period of 30 days for public review and comment if such modifications are substantial. NMFS and the Navy will meet annually (if deemed necessary by either agency) to discuss the monitoring reports, Navy research and development outcomes, current science, and determine whether mitigation or monitoring modifications are appropriate. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(a) Results from the Navy's monitoring from the previous year's operation of SURTASS LFA sonar.

(b) Compiled results of Navy-funded research and development studies.

(c) Results from specific stranding investigations.

(d) Results from general marine mammal and sound research funded by the Navy or other sponsors.

(e) Any information that reveals marine mammals may have been taken in a manner, extent or number not anticipated by these regulations or subsequent Letters of Authorization.

## PARTS 219–220 [RESERVED]

## PART 221—PRESCRIPTIONS IN FERC HYDROPOWER LICENSES

### Subpart A—General Provisions

Sec.

221.1 What is the purpose of this part, and to what license proceedings does it apply?

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